92-1318

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

NELSON R. RABY, *et al.*,

Petitioners,

v.

M/V PINE FOREST, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Civil Appeal Nos. 90-35618, 90-35879, 91-35375

PETITION FOR WRIT OF CERTIORARI

RICHARD J. DODSON
La. Bar Roll No. 4982
DODSON, BULLOCK & VIDRINE
A Professional Law Corporation
628 North Boulevard
Baton Rouge, Louisiana 70802
(504) 344-0633
Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit erred when it held that truth is an absolute defense to the tort of blacklisting?

2. Whether the United States Court of Appeals for the Ninth Circuit erred (a) when it failed to assign reasons for reversing the district court's finding that back wages were due, and (b) when it narrowly interpreted the provisions of the Seaman's Wage Act to find the Act inapplicable to a foreign flagged vessel which derived 100 percent of its income from voyages to the United States.

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners

Plaintiffs Nelson Raby, Teofanis Roz, Apolonio Torreliza, Leo Ajero, Teodoro Rabie, Modesto Berido, Marcelo Suarez, Jr., Miguelito Cabales, Teodoro Marquez, Leonardo Bonnit, Cervasito Laxina, Hermenigildo Banogon and Camilo Alvarado.

Counsel for Petitioners:

Richard J. Dodson
Dodson, Bullock & Vidrine
628 North Boulevard
Baton Rouge, Louisiana 70802

Respondents

M/V Pine Forest, *in rem*, Delica Shipping, S.A., and Inui Steamship Co., Ltd.

Counsel for Respondents:

Robert Sanders and
Kathleen A. McKeon
Wood, Tatum, Wonacott
& Landis
13th Floor
1001 Southwest Fifth Avenue
Portland, Oregon
97204-1129

Joseph S. Stacey
LeGros, Buchanan, Paul
& Whitehead
2500 Columbia Center
701 Fifth Avenue
Seattle, Washington
98104-7098

TABLE OF CONTENTS

Questions Presented i

List of All Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Proceedings in the Case Below 1

Jurisdictional Statement 1

Authorities Considered 1

Statement of the Case 3

Argument in Favor of Granting Petitioners' Application for Writs 7

A. Blacklisting and the Defense of Truth 11

B. The Narrow Interpretation of the Provisions of the Seaman's Wage Act and Failure to Assign Reasons for Reversal of the Award of Back Wages Due 22

1. The Court of Appeals clearly erred when it failed to assign reasons for reversing the award of back wages 22

2. The Court of Appeals narrowly interpreted the Seaman's Wage Act to defeat the cause of action for penalty wages thereunder ... 24

Conclusion 30

Appendix A1

TABLE OF AUTHORITIES

Page

CASES

American Foreign S.S. Co. v. Matise, 488 F.2d 469 (9th Cir. 1974), reversed on other grounds, 423 U.S. 150 (1975) 8

Anderson v. Bessemer City, 470 U.S. 564 (1985) 23

Angad v. M/V Fareast Trader, 1989 AMC 2721 (S.D.Tex. 1989) 17

Arguelles v. U.S. Bulk Carriers, 408 F.2d 1065 (2d Cir. 1969), affirmed 400 U.S. 351 (1971) 16

Beasley v. Texas & P&R Co., 191 U.S. 492 (1903)..... 9

Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957)..... 19

Burie v. Overseas Navigation Corp., 205 F.Supp 182 (S.D.N.Y. 1962) 28

Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031, 1033 (9th Cir. 1970)..... 20

Carroll v. Protection Maritime Ins. Co., Ltd., 512 F.2d 4 (1st Cir. 1975) 12

Chung Yong Il v. Overseas Navigation Co., 774 F.2d 1043 (11th Cir. 1983), *cert. denied* 474 U.S. 1177 (1986) 27

Collie v. Fergusson, 281 U.S. 52 (1930)..... 8

Fitzgerald v. Liberian S/T Chryssi P. Goulandris, 582 F.2d 312 (4th Cir. 1978)..... 8

Griffin v. Oceanic Contractors, 458 U.S. 564 (1982) 7, 16, 27, 28

TABLE OF AUTHORITIES – Continued

Page

John Hancock Mut. Life Ins. Co. v. National Labor Relations Board, 191 F.2d 483, 485 (D.C. Cir. 1951) 20

Jose v. Fir Grove, 801 F.Supp. 1015 (D.Or. 1992) 6, 11

La Bourgogne, 210 U.S. 95 (1908) 26

Masoni v. Board of Trade of San Francisco, 260 P.2d 205 (Cal. App. 1953)..... 14

McCrea v. U.S., 294 U.S. 23 (1935)..... 8

McCulloch v. Sociedad Nacional Marineros de Honduras, 372 U.S. 10 (1963)..... 19

Miles v. Apex Shipping, ___ U.S. ___, 111 S.Ct. 317 (1990) 8

NLRB v. Schill Steel Products, 480 F.2d 586, 594 (5th Cir. 1973) 21

NLRB v. Searle Auto Glass, Inc., 762 F.2d 769 (9th Cir 1985)..... 21

Ostrofe v. H.S. Crocker Co., Inc., 670 F.2d 1378 (9th Cir. 1982) 20

Pacific Mail S.S. Co. v. Schmidt, 241 U.S. 245 (1916) ..8, 27

Patterson v. Bark Eudora, 190 U.S. 169 (1903)..... 8

Pino v. Protection Maritime Ins. Co., Ltd., 599 F.2d 10 (1st Cir. 1979) 12, 15, 21

Scussel v. Balter, 386 So.2d 1227, 1228 (Fla. App. 1980)..... 15

Smith v. Atlas Off-Shore Boat Service, Inc., 653 F.2d 1057 (5th Cir. 1981)..... 12, 19

Smithers v. Metro-Goldwyn-Mayer Studios, Inc., 139 Cal.App.3d 643, 189 Cal.Rptr. 20 (1983) 14

TABLE OF AUTHORITIES – Continued

Page

Strathearn S.S. Co. v. Dillon, 252 U.S. 348 (1920) 8, 16, 17, 28

The Black Eagle and Concordia, 87 F.2d 891 (1937) 26

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987) 9

Vaughn v. Atkinson, 369 U.S. 527 (1962)..... 6

Woodstock Iron Co. v. Richmond & D. Extension Co., 129 U.S. 643, 9 S.Ct. 402.....9, 10

Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) 20

Yaindl v. Ingersoll-Rand Co., 422 A.2d 611, 623, 624 (Pa. Super. 1980) 16

CONSTITUTIONS

Ariz. Const. art.18, § 9 13

N.D. Const. art. XII, §§ 17,19 13

Utah Const. art. XII, § 19, art. XVI § 4..... 14

STATUTES

Act 23 Stat. 53 (June 26, 1884)..... 17

F.R.C.P. Rule 52(A) 23

28 U.S.C. § 1254..... 1

28 U.S.C. § 1331..... 4

28 U.S.C. § 1333..... 4

29 U.S.C. § 158 (a)(3-4) 19

29 U.S.C. § 215..... 19

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 660 19
45 U.S.C. § 60 19
45 U.S.C. § 441(a) 19
46 U.S.C. § 183 26
46 U.S.C. § 10313 ..... *passim*
46 U.S.C. § 10314 10
46 U.S.C. § 10315 10
Ala. Code § 13A-11-123 (1975) 13
Ariz. Rev. Stat. Ann. § 23-1361 (1983) 13
Ark. Stat. Ann. § 81-211 (1976) 13
Cal. Lab. Code §§ 1050, 1051 (West 1971) 13
Colo. Rev. Stat. § 8-2-111 (1973) 13
Conn. Gen. Stat. Ann. § 31-51 (West 1972) 13
Fla. Stat. Ann. § 351.20 (West 1968) 13
Ind. Code. Ann. §§ 22-2-5-3, 22-5-3-1 (West 1981) 13
Iowa Code Ann. § 730.2 (West 1979) 13
Kans. Stat. Ann. § 44-117 (1981) 13
LA. Rev. Stat. Ann. § 23:963 (West 1964) 13
Me. Rev. Stat. Ann. tit. 17, § 401 (1983) 13
Minn. Stat. Ann. §§ 179.12 (6), 179.60 (West 1966) 13
Miss. Code Ann. § 77-9-752 (1972) 13
Mont. Code Ann. § 39-2-803 (1981) 13
Nev. Rev. Stat §§ 613-200, 613.210 (1981) 13

TABLE OF AUTHORITIES – Continued

Page

N.M. Stat. Ann. § 30-13-3 (1978) 13

N.Y. Lab. Laws § 704-9 (consol. 1983) 13

N.C. Gen. Stat. § 14-355 (1981) 13

Ohio Rev. Code Ann. § 1331.02 13

Okla. Stat. Ann. tit 40, § 172 (West 1954) 13

Ore. Rev. Stat. § 659.230 (1981) 14

R.I. Gen. Laws § 28-7-13(9) (1979) 14

Tenn. Code Ann. § 50-1-202 (1983) 14

Tex. Rev. Civ. Stat. Ann. art. 5196(1) (Vernon 1971) 14

Utah Code Ann. §§ 34-24-1, 34-24-2 (1971) 14

Va. Code § 40.1-27 (1981) 14

Wash. Rev. Code Ann. § 49.44.010 (1962) 14

Wis. Stat. § 134.02 (1981) 14

Restatement, First of Torts 15

Restatement, Second of Torts, § 772 ..... 12, 14, 15, 16

OTHER AUTHORITIES

Amicus Brief of the U.S. in *Strathearn v. Dillon*, 252 U.S. 348 (1920) 28

Bickell, *Strathearn S.S. Co. v. Dillon, An Unpublished Opinion*, 69 Har.L.Rev. 1177 .....16, 28

Chapman, *Trouble on Board* (Cornell University 1992) 11

TABLE OF AUTHORITIES – Continued

Page

Forsyth, *The American Merchant Marine and His Industry* (New York: Taylor & Francis New York 1989) 16

Green, *The Torts Restatement*, 29 Ill.L.Rev. 582 (1935) 15

Holloway, William J., and Michael Leech, *Employment Termination: Rights and Remedies* (Washington, D.C.: The Bureau of National Affairs, Inc. (1985) 13, 14, 21

Milner, *Restatement: The Failure of a Legal Experiment*, 20 U.Pitt.L.Rev. 794 (1959) 15

Prosser & Keeton, *The Law of Torts*, 17 (5th ed. 1984 & Supp. 1988) 15

PROCEEDINGS IN THE CASE BELOW

The district court opinion in *Raby v. M/V Pine Forest* is reported in part at 1990 A.M.C. 2441 (W.D. Wa. 1990) [transcribed in full in appendix]; on supervisory writs to the United States Court of Appeals for Ninth Circuit, *Raby v. M/V Pine Forest* reported at 918 F.2d 80 (9th Cir. 1990); cert. denied. ___ U.S. ___, 114 L.Ed.2d 101 (1991); on appeal to the United States Court of Appeals for the Ninth Circuit, *Raby v. M/V Pine Forest*, consolidated with *Su v. M/V Southern Aster*, reported at 978 F.2d 462 (9th Cir. October 14, 1992), rehearing denied on December 9, 1992.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Ninth Circuit, sought to be reviewed herein, was issued on October 14, 1992; application for rehearing was denied on December 9, 1992. The jurisdiction of this Honorable Court is predicated on 28 U.S.C. § 1254, Writs of Certiorari to the United States Courts of Appeals.

AUTHORITIES CONSIDERED

46 U.S.C. § 10313, in pertinent part (set forth in its entirety in the appendix), reads:

* * *

> "(e) After the beginning of a voyage, a seaman is entitled to receive from the master, on demand, one half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the

expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside for good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed . . .

* * *

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section."

STATEMENT OF THE CASE

Plaintiffs, thirteen (13) Filipino seamen who served aboard the vessel M/V Pine Forest, a bulk carrier, flying the flag of Vanuatu, instituted this action in the United States District Court for the Western District of Washington for unpaid wages and statutory penalties pursuant to 46 U.S.C. § 10313, and for claims of intentional tortious conduct by the shipowner, including blacklisting under the general maritime law. Named Defendants are the vessel M/V Pine Forest, *in rem*, and its owners and operators, Inui Steamship Co., Ltd. and Delica Shipping, S.A. The district court clearly found that the M/V PINE FOREST was a new ship in which plaintiffs were engaged for the maiden voyage. Each of the subsequent voyages was from Japan to the United States and back, the purpose of which was to carry logs and wood products from the Pacific Northwest to Japan. As a result thereof, 100% of the business transacted by the vessel was from commerce with the United States. Plaintiff seamen were required to sign two sets of portage bills or wage receipts monthly, one set falsely acknowledging receipt of the amount of wages due under the shipping articles, and the other reflecting the actual lower amount paid to each Plaintiff, all in violation of United States, Vanuatu and international law. Defendants maintained a policy of terminating any seaman that refused to participate in the double bookkeeping scheme and blacklisting that seaman from ever being employed again as a merchant seaman. Upon the arrest of the vessel, Defendants partially paid the seamen's wages stipulated in the shipping articles which were subject to the suit and then promptly counterclaimed for the return of these wages. In accordance with

its established policy, the Defendants blacklisted Plaintiffs from ever working again as merchant seamen by making truthful notations in each of the Plaintiff's Seaman's Book while they were still on a vessel in a U.S. harbor. While the notations were truthful, "Requested repatriation upon filing wages claim to arrest vessel", the district court found that Defendants made the notations with the motive and intent to blacklist Plaintiffs in retaliation for Plaintiffs seeking the protection of the Seaman's Wage Act, 46 U.S.C. § 10313. Jurisdiction of the district court was invoked on federal question jurisdiction, 28 U.S.C. § 1331, and the Saving to Suitor's Clause of Admiralty and Maritime Jurisdiction, 28 U.S.C. § 1333, for claims under the Seaman's Wage Act, 46 U.S.C. § 10313.

As regards each of the questions presented, the following facts are germane:

The district court explicitly found that Defendants made the notation, "Requested repatriation upon filing wages claim to arrest vessel" in their Seaman's Books with the motive and intent of blacklisting Plaintiffs and prohibiting Plaintiffs from obtaining any future employment as merchant seamen as retaliation for Plaintiffs bringing the action to recover their wages under 46 U.S.C. § 10313. The district court expressly found that Defendants' conduct "was for retaliation and punishment of the Plaintiffs for requesting what they were lawfully entitled to – their wages" and that Plaintiffs were not able to be employed as merchant seamen because of Defendants' blacklisting. The Ninth Circuit reversed, holding that the truthfulness of the notations was an absolute defense to Plaintiffs' claims for blacklisting, regardless of Defendants' illegitimate motive or intent and Plaintiffs' resulting unemployability.

The trial court explicitly found that after the arrest and partial payment of wages, the Defendant vessel and its owners, Delica Shipping and Inui Steamship Co., Ltd., were still in arrears for wages due in an amount of $23,696.00, and that the wages were withheld without sufficient cause in violation of 46 U.S.C. § 10313. The Ninth Circuit reversed, without any explanation whatsoever.

The district court explicitly found that the M/V Pine Forest made eight (8) separate voyages from Japan to the United States and that Plaintiffs had legally demanded one-half wages each time the M/V Pine Forest was in a United States port in accordance with 46 U.S.C. § 10313(e). The district court found that the Defendants wrongfully refused the demand for one-half wages entitling the seamen to full wages and double wages. The Ninth Circuit reversed holding that there was insufficient demand for one-half wages which precluded the application of the half wage statute, 46 U.S.C. § 10313(e).

The district court found that Defendants illegally withheld wages at the end of each of the eight (8) separate voyages from Japan to the United States in violation of the full wage statute, 46 U.S.C. § 10313(f). The district court found that each separate trip was a "voyage" and that the term "cargo" in the wage statute was broad enough to encompass the term "ballast". The court of appeals reversed and found that the term "voyage" encompasses the time a seaman commences to work on board a ship and ends only upon completion of the contract or by premature discharge. Additionally, the Ninth Circuit reversed on the basis that ballast on board the M/V Pine Forest (sea water) was worthless and thus not cargo under the Act.

At the trial of this matter, the district court found for Plaintiffs in the total sum of $32,657,006.00, for wages, double wages, and damages, including punitive damages for their willful and wanton acts of blacklisting. Defendants moved for a supersedeas bond to stay execution of the judgment pending an appeal to the United States Court of Appeals of the Ninth Circuit. The appeal on the merits was rendered on October 20, 1992, and the court of appeals reversed the judgment in its entirety except for the award of attorney fees under this Court's decision in *Vaughn v. Atkinson*, 369 U.S. 527 (1962).

In an attempt to morally justify its holding, the Ninth Circuit in its introduction to the litigation mischaracterizes it as "an ongoing dispute between shipowners and International Transport Workers' Federation" stating that "if the owners fail to pay the union rate, the unions will sometimes interfere with the loading and unloading of ships." The Ninth Circuit completely ignored the record of this litigation, as it was uncontradicted that no union inspector *ever* inspected the M/V Pine Forest, nor had any vessel owned by the Defendants ever been detained or interfered with by the ITF or its affiliates. Indeed, the shipowner testified that it had never experienced any ITF interference and that its definition of "union harassment" was any time a seaman asked for their wages due under the shipping articles. This particular shipowner did not devise the defense of "the union is evil and made me do it" until the subsequent litigation in *Jose v. Fir Grove*, 801 F.Supp. 1015 (D.Or. 1992). Then, after considerable evidence as to the role of the International Transport Workers' Federation and foreign shipowners, the district court in *Jose* rejected Defendants' contentions. The M/V Fir Grove is a sister ship of the M/V Pine Forest, owned

by the same Panamanian corporation and beneficially owned and operated by the same Japanese defendants as in this litigation.

The individual Plaintiffs herein continue to be unemployed and unemployable as a result of the conduct of the Defendants complained of herein.

ARGUMENT IN FAVOR OF GRANTING PETITIONERS' APPLICATION FOR WRITS

Rule 10 of the Rules of the Supreme Court provides that one of the special and important reasons for granting a writ of certiorari to review a court of appeal decision is when a United States Court of Appeal has rendered a decision in conflict with the decision of another United States Court of Appeal on the same matter. Petitioners request review by this Honorable Court on this basis and because of the underlying importance of seamen being able to obtain the protection of the Seaman's Wage Act as mandated by Congress without suffering the penalty of blacklisting. Petitioners respectfully submit that it is time again for this Court to address the complexities of 46 U.S.C. § 10313 as the last time this Court did so was in *Griffin v. Oceanic Contractors*, 458 U.S. 564 (1982), which was prior to its amendment and restatement in 1983.[1]

[1] The wage statute was amended in August of 1983 and is presently contained in 46 U.S.C. § 10313. It is clear that Congress intended that there be no substantive change in the law with the enactment of 46 U.S.C. § 10313 in 1983. *U.S. Code, Congressional and Administrative News*, Vol. 2, 98 Congress, 1st Session, 1983 "Legislative History", P.L. 98-89, Partial Revision of Title 46 U.S. Code, Shipping; see also, Report No. 98-56, 98th Congress, 1st Session, "Marine Safety and Seamen's Welfare", particularly,

The opinion of the Ninth Circuit of October 20, 1992, presents a clear conflict among the circuits and now subjects the fortunes of seamen wage litigation to a great extent upon the location of the suit. The Ninth Circuit decision is in direct conflict with the First Circuit, Fifth Circuit, and Eleventh Circuit; and as shown below it is in conflict with decisions of this Court. This Honorable Court in *Miles v. Apex Shipping*, ___ U.S. ___, 111 S.Ct. 317 (1990), noted the overriding concern for uniformity in maritime matters. Along with the desire for uniform approach in maritime matters, there is a constant desire for uniformity in the application of federal statutes and the general maritime law.

The Ninth Circuit decision punishes those that the statute was intended to protect by requiring a seaman to forego his right of future employment by claiming his wages and seeking the protection of 46 U.S.C. § 10313. The Ninth Circuit opinion allowed these Plaintiffs no recovery whatsoever and imposes new and impossible requirements for the application of 46 U.S.C. § 10313(e) and (f) to foreign vessels that earn 100% of their income

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"Purposes of Bill", p. 1, "Substantive Changes Not Intended", p. 10; see also, Congressional Record-Senate, S11 568, et seq., August 3, 1982, Comments of Senator Packwood.

The Seaman's Wage Act, unlike many other statutes, has received an inordinate amount of attention from this Court in the past because of its strategic importance both to United States merchant marine policy and because of its application to seamen who are traditionally viewed as wards of the court. See *Patterson v. Bark Eudora*, 190 U.S. 169 (1903); *Pacific Mail S.S. Co. v. Schmidt*, 241 U.S. 245 (1916); *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920); *McCrea v. U.S.*, 294 U.S. 23 (1935); *Collie v. Fergusson*, 281 U.S. 52 (1930); *American Foreign S.S. Co. v. Matise*, 423 U.S. 150 (1975).

from trade with the United States. As a practical matter, the Ninth Circuit's opinion ratifies the actions of unscrupulous shipowners by making it economically advantageous to violate the general maritime law and international law by maintaining double books.

The practical and theoretical implications flowing from the decision in the instant case require careful consideration of public policy concerns. Because such public policy concerns extend to the interests of third parties, and especially unrepresented public interests, the court must not "lend its aid" to those who found their practices on "immoral or illegal acts". See, *Beasley v. Texas & P&R Co.*, 191 U.S. 492 (1903); and *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987). To do so, undermines the integrity of the judiciary to the extent it endorses corrupting practices and condones flagrant attempts to evade the underlying purposes of federal law. The district court found that Defendants never intended to pay Plaintiffs their full wages and took the retaliatory action of blacklisting with the motive and intent of punishing Plaintiffs for having sought the protection of the Seaman's Wage Act. Defendants' conduct is repugnant to both the sanctity of contracts and public morality, and – if allowed to freely continue – must necessarily prove "corrupting in its tendency."

In matters of public transportation and commerce, this Court long ago recognized a contract as void as against public policy, which is "immoral in its conception and corrupting in its tendency." *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U.S. 643, 9 S.Ct. 402. In *Woodstock Iron Co.*, the Court held void a contract by an extension company (an employee of a railroad company) with a third party to violate its engagement with its

employer in locating and constructing a railroad and, instead of selecting the shortest, cheapest, and most suitable route, to locate the road by a longer route thereby imposing an unnecessary burden upon its employer. The Court further determined that the transaction on the part of the third party was nonetheless offensive because of the threats from the extension company that it would cause the road to be located in a different route.

As in *Woodstock*, Defendants conduct violated public policy and was "immoral in its conception and corrupting in its tendency". The deceit and corruption is compounded when the perpetrators purport to disregard prevailing maritime practices and general norms of international law which consider the shipping articles to be the proper contract of employment for the seamen who are signatories. The "corrupting tendencies" continue with instructions to seamen to lie to union inspectors and similar authorities, and other acts calculated to breed contempt for authority and flagrant disregard for both contractual obligations, as well as international law and the law of the port state, e.g., the federal law of the United States. In obtaining clearance from U.S. harbors on eight (8) separate occasions, the Defendants were required to present the shipping articles to U.S. authorities as required by 46 U.S.C. § 10314(d) and 46 U.S.C. § 10315(d).

The Ninth Circuit opinion condones an overt effort, designed and intended to evade the purposes and underlying public policies of United States law, namely the Seaman's Wage Act. The implications – both practical and theoretical – of the Ninth Circuit's approval of Defendants' conduct, extend far beyond the parameters of the instant case, embracing the very corrupting practices and

abuse of national interests which public policy presumes to protect.

A. Blacklisting and the Defense of Truth

The trial court found that the truthful notations made in each Plaintiff's Seaman's Book were with the motive and intent to punish Plaintiffs in retaliation for Plaintiffs' filing suit in the United States. The Ninth Circuit acknowledged this in the portion of its opinion holding the demand for one-half wages to be insufficient noting the testimony of the seamen that ". . . had they made their demands explicit, they would have been terminated." Interestingly, the Ninth Circuit noted the book by Reverend Paul K. Chapman, formerly the Director of the Center for Seafarers' Rights, Seamen's Church Institute of New York, and presently the Executive Director of the North American Maritime Ministry Association.[2] Regrettably, the court did not read the entire book which clearly establishes that a Philippine seaman complaining about his wage conditions suffers retaliation and blacklisting at the hands of the shipowners and is directly aided by both the Philippine manning agent and Philippine Government in seeing that this seaman never works again.[3]

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[2] The Ninth Circuit cited Reverend Chapman's book noting that the country of the vessel's flag, Vanuatu, "is well known for its unintrusive admiralty law." See Appendix A, p. 4, n. 1; see Chapman, *Trouble on Board* (Cornell University 1992).

[3] See Chapman, *Trouble on Board*, supra, pp. 27-28, 39-41, 70. See also, *Jose v. Fir Grove*, 801 F.Supp. 358, 360-365 (D.Or. 1992). In *Jose v. M/V Fir Grove*, the trial court on its own motion enjoined these same Defendants Delica Shipping and Inui Shipping from taking any steps to regain possession of the awards made by the court.

The court of appeal found that the district court's award of damages for blacklisting must be reversed because truth is an absolute defense to blacklisting regardless of motive or intent, citing the *Restatement (Second) of Torts*, § 772. The Ninth Circuit, in reversing the decision of the district court, relied solely on the Restatement and clearly ignored precedent of other circuits, including the decision of the United States Court of Appeals for the First Circuit in the cases of *Carroll v. Protection Maritime Ins. Co., Ltd.*, 512 F.2d 4 (1st Cir. 1975); *Pino v. Protection Maritime Ins. Co., Ltd.*, 599 F.2d 10 (1st Cir. 1979); and the decision of the Fifth Circuit in *Smith v. Atlas Off-shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981). The general maritime law tort of "blacklisting" was first recognized in the cases of *Carroll* and *Pino*. Therein, the First Circuit found that an insurance company's deliberate interference with the future employment relationships of seamen who had brought Jones Act claims constituted inappropriate and unlawful interference, or blacklisting. In *Smith v. Atlas*, the Fifth Circuit held retaliatory action by shipowner resulting from the seaman's filing a Jones Act claim to constitute tortious conduct.

In the decision complained of below, both the Ninth Circuit and the First Circuit have found that a legal cause of action exists for "blacklisting" and the Fifth Circuit recognizes retaliatory action as tortious conduct. However, truth is only an absolute defense in the Ninth Circuit. Both the First and Fifth Circuits consider the motive and intent behind the act, and the consequences to the

seaman and the justification, if any, for the conduct. The rule of the Ninth Circuit that truth is an absolute defense for a seaman seeking the protection of the maritime wage statute ignores the traditional status of a seaman as the ward of the court, circumvents the policy of Congress in extending the wage statute to foreign seamen, and is at odds with the historical development of the tort of blacklisting.

The concept of blacklisting was originally associated with employer opposition to labor unions, and was a means of preventing possible union adherents from getting in the work place. Holloway & Leech, *Employment Termination: Rights and Remedies* 246 (1985).[4] Blacklisting, as an actionable form of interference with prospective economic advantage, has been prohibited in some form by almost all of the States of the Union.[5] The duty not to

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[4] Holloway, William J., and Michael J. Leech, *Employment Termination: Rights and Remedies* (Washington, D.C.: The Bureau of National Affairs, Inc. 1985).

[5] Ala. Code § 13A-11-123 (1975); Ariz. Const. art.18, § 9, Ariz. Rev. Stat. Ann. § 23-1361 (1983); Ark. Stat. Ann. § 81-211 (1976); Cal. Lab. Code §§ 1050, 1051 (West 1971) (by misrepresentation); Colo. Rev. Stat. § 8-2-111 (1973); Conn. Gen. Stat. Ann. § 31-51 (West 1972); Fla. Stat. Ann. § 351.20 (West 1968) (railroads only); Ind. Code. Ann. §§ 22-2-5-3, 22-5-3-1 (West 1981); Iowa Code Ann. § 730.2 (West 1979); Kans. Stat. Ann. § 44-117 (1981); LA. Rev. Stat. Ann. § 23:963 (West 1964) (no blacklist for failure to buy at designated store); Me. Rev. Stat. Ann. tit. 17, § 401 (1983); Minn. Stat. Ann. §§ 179.12 (6), 179.60 (West 1966); Miss. Code Ann. § 77-9-752 (1972) (railroad and telephone companies union membership); Mont. Code Ann. § 39-2-803 (1981); Nev. Rev. Stat §§ 613-200, 613.210 (1981); N.M. Stat. Ann. § 30-13-3 (1978); N.Y. Lab. Laws § 704-9 (consol. 1983); N.C. Gen. Stat. § 14-355 (1981); N.D. Const. art. XII, §§ 17,19; Ohio Rev. Code Ann. § 1331.02 (page 1979); Okla. Stat. Ann. tit

blacklist has been held to arise out of the duties of good faith and fair dealing found in the common law. See, e.g., *Smithers v. Metro-Goldwyn-Mayer Studios, Inc.*, 139 Cal.App.3d 643, 189 Cal.Rptr. 20 (1983). Because of the fear that any communication to another potential employer would result in tort liability, many of these statutes have generally recognized that a truthful response *to reference requests* may be made without liability. Holloway & Leech, *supra*, at 247. This is presumably the origin of the "truth" defense of § 772 of the *Restatement (Second) of Torts*, though the *Restatement* defense extends much further than simple requests for references from previous employers. The approach of the *Restatement*, however, allows any truthful statement to be privileged regardless of the legitimacy of the interest of the defendant in communicating that information to others.[6]

40, § 172 (West 1954); Ore. Rev. Stat. § 659.230 (1981); R.I. Gen. Laws § 28-7-13(9) (1979); Tenn. Code Ann. § 50-1-202 (1983) (union membership); Tex. Rev. Civ. Stat. Ann. art. 5196(1) (Vernon 1971); Utah Const. art. XII, § 19, art. XVI § 4, Utah Code Ann. §§ 34-24-1, 34-24-2 (1971); Va. Code § 40.1-27 (1981); Wash. Rev. Code Ann. § 49.44.010 (1962); Wis. Stat. § 134.02 (1981).

[6] The defense of truth created in § 772 developed out of a California case, *Masoni v. Board of Trade of San Francisco*, 260 P.2d 205 (Cal. App. 1953). See Reporter's Notes to § 722. The *Masoni* court recognized that conveyance of truthful information would not constitute tortious interference where the truthful information was presented as a legitimate concern "therein to secure payment of a legitimate debt." The absolute defense of truth has been criticized and did not form a part of the maritime law of the United States until the Ninth Circuit's decision in *Raby*.

Blind reliance on the *Restatements* by any court has been questioned, if not criticized, by several commentators, including Professors Prosser & Keeton's remarks:

> "The form of the Restatement is perhaps unfortunate, in that it seeks to reduce the law to a definite set of black-letter rules or principles, ignoring all contrary authority – since the law of torts in its present state of development does not lend itself at all readily to such treatment. There is room for suspicion that the courts tended to cite the Restatement when they are already in agreement with it, and to ignore it when they are not, so that the impressive list of references to it in the cases may be somewhat misleading; and there are those who have disagreed with many of its conclusions and even denounced the whole project."

Prosser & Keeton, *The Law of Torts*, 17 (5th ed. 1984 & Supp. 1988); see also Green, *The Torts Restatement*, 29 Ill.L.Rev. 582 (1935), and Milner, *Restatement: The Failure of a Legal Experiment*, 20 U.Pitt.L.Rev. 794 (1959).

Many courts have not concerned themselves with the veracity of the statements if the communications were intended to defeat the legal action granted to them by law. In *Pino v. Protection Maritime Ins. Co, supra*, there is no question that the insurance company's statements were based upon truth and not upon falsity. However, the court did not entertain any defense of truth. The court of appeal in *Pino, supra*, focused on the motive or intent of the defendant and did not consider the defense of truth. While the decision of *Pino* was grounded in the *Restatement (First) of Torts*, other courts have declined to apply the truth defense of § 772 of *Restatement (Second) of Torts*, where the communication was based on improper purposes. For example, in *Scussel v. Balter*, 386 So.2d 1227,

1228 (Fla. App. 1980), the court refused to apply § 772 under the circumstances; and in *Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611, 623, 624 (Pa. Super. 1980), the court found that the defenses of § 772 are not absolute but must be considered in light of other policies.

The Ninth Circuit's restrictive opinion is in violation of the well established rule that seamen are wards of the court, *Arguelles v. U.S. Bulk Carriers*, 400 U.S. 351, 355 (1971), and is in complete derogation of the policies underlying the Seaman's Wage Act and its availability to foreign seamen. The Seaman's Wage Act has been in existence in some form since 1790. See discussion in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 572 (1982). One of the many essential purposes of the Act was to "secure the promptest possible payment of wages." *Id.*, at 573. However, this is not *the only* motivating reason for the application of the Seaman's Wage Act to foreign seamen. As was submitted to this Court seventy years ago in the case of *Strathearn S/S Co. v. Dillon*, 252 U.S. 348 (1920), the primary purpose of extending the Wage Act to foreign seaman was to encourage the survival of the American merchant marine by equalizing the costs between the American merchant marine and others. See Bickell, *Strathearn S/S Co. v. Dillon*, an unpublished opinion, 69 Har.L.Rev. 1177; and generally Forsyth, *The American Merchant Marine and His Industry* (1989).[7]

Strathearn S/S Co. v. Dillon, supra, involved a claim for wages by a British subject while on a British-flagged vessel in Florida. Particularly, the case involved application of the one-half wage provision of the Wage Act, now

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[7] Forsyth, Craig J, *The American Merchant Seaman and His Industry* (New York: Taylor & Francis New York, Inc. 1989).

46 U.S.C. § 10313(e). The United States filed an amicus brief in this matter because of strong national concerns that the applicability of the Wage Act to foreign flagged vessels be upheld.[8] There are several policies presented by the United States as amicus which bear strongly on the intended purpose of the Wage Act. Page 4 of the Amicus Brief of the U.S. reaffirms what Petitioners submitted to this Court earlier:

> "The purpose sought to be accomplished was to equalize on foreign vessels the burdens placed by American law, in its care for American seamen, upon the American merchant marine, by making such foreign vessel seeking American ports subject to regulations affecting American vessels."

As noted in the Amicus Brief, the passage of the Seaman's Wage Act was in response to strong national concern about the decline in the American Merchant Marine. See also *Angad v. M/V Fareast Trader*, 1989 A.M.C. 2721 (S.D. Tex. 1989). As was presented to the district court in this case, and as recognized by the Amicus Brief in *Strathearn S/S Co.*, the decline of the merchant marine was attributable to several factors. However, one specifically was focused on by the district court in this case and the United States as amicus: a higher cost of operation, due primarily to higher wage standards. Amicus Brief, at 5. The Congress considered lowering the wage standards of American seamen through passage of Act 23 Stat. 53, of June 26, 1884, but it failed. The Seaman's Wage Act of

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[8] This brief was filed by the United States through the Solicitor General Alex C. King in November 1919, Docket No. 373. It is not reproduced since this Court has this brief on record.

1915, now 46 U.S.C. § 10313, reverses this approach and instead seeks to raise the standards of foreign vessels to those found in America. Amicus Brief, at 6. The most important goal of the legislation was summed up as follows:

> "While the application of the act here contended for will benefit foreign seamen as well as American, this is essential in order to make effective such benefits for American seamen and to protect the American merchant marine. For if foreign ships manned by foreign crews could come in to American ports free from liability to respond to the demands of the sailors for wages, shippers and ship brokers would give preference to foreign charters, and the masters would discriminate against American seamen. Thus it would come about that instead of benefiting American men and American shipping, the act would be but another hindrance.
>
> Therefore, to make the act effective for the benefit of American seamen and the protection of American ships, it is provided that masters of foreign vessels, while completely at rest in our ports, and enjoying our hospitality and the protection of our laws, shall be under like liability with the master of American vessels to respond to the demands of their crews for one-half of their accrued wages." Amicus Brief, at 9-10.

Accordingly, national policy is strongly behind equal enforcement of the wage statute to foreigners and Americans alike. Any activity which would interfere with enforcement of these provisions or frustrate the basic policy behind the wage statute should not be tolerated, much less sanctioned, by the admiralty courts.

The Ninth Circuit opinion is contrary to the approach taken both by Congress and numerous courts in implementing other congressional acts and federal labor law. Numerous federal statutes likewise prohibit retaliatory or discriminatory conduct associated with various aspects of the employer-employee relationship.[9] Many of these don't apply in this case because of a broader policy not to apply federal labor law to foreign flagged vessels absent clear congressional intent. See *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), *McCulloch v. Sociedad Nacional Marineros de Honduras*, 372 U.S. 10 (1963). However, courts around the country have uniformly granted private causes of action because of the public policy against illegitimate interference with employee enforcement of their rights granted under federal law.

For example, in *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), the court of appeal answered the question of whether a Jones Act seaman whose at-will employment is terminated because he filed suit against his employer under the provisions of the Jones Act had a cause of action under the general maritime law. The answer was clearly in the affirmative:

> "The recognition of a cause of action in admiralty providing the seaman with relief from a discharge caused by his filing of a claim against the employer is particularly appropriate in light of the admiralty court's protective attitude towards seaman. . . . We conclude . . . that a discharge in retaliation for a seaman's exercise

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[9] National Labor Relations Act, 29 U.S.C. 158 (a)(3-4); Fair Labor Standards Act, 29 U.S.C. 215; Federal Employer's Liability Act, 45 U.S.C. 60; Federal Railroad Safety Act, 45 U.S.C. 441 (a); and Occupational Safety and Health Act of 1970, 29 U.S.C. 660 (c)(1).

> of his legal right to file a personal injury actions against the employer constitutes a maritime tort."

Similarly, in *Burke v. Compania Mexicana de Aviacion*, 433 F.2d 1031, 1033 (9th Cir. 1970), the court of appeals in granting a cause of action for violation of the Railway Labor Act of 1926 stated:

> "In the absence of clear congressional intent to the contrary, the courts are free to fashion appropriate civil remedies based on the violation of a penal statute where necessary to ensure the full effectiveness of the congressional purpose."

See also, *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967). *Wyandotte Transp. Co., supra*, and in *Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378 (9th Cir. 1982), the court of appeals found that if the court failed to extend a private remedy under the penalty provisions of the Clayton Act it would guarantee retaliatory action, thus ultimately encouraging noncompliance with the act. Accordingly, the court found a private cause of action to exist.

Thus, the protections extended to the labor force has been interpreted broadly in favor of encouraging compliance with the enforcement provisions of those acts. For example, the United States Court of Appeals for the District of Columbia, in *John Hancock Mut. Life Ins. Co. v. National Labor Relations Board*, 191 F.2d 483, 485 (D.C. Cir. 1951), held that the anti-retaliatory provisions of the NLRA extends not only to current employees but to members of the workforce, in general: "in the absence of specific limitation, [the term employee] includes not only the existing employees of an employer but also, in a generic sense, members of the working class." The facts of the case reveal that the court found that the employer

had refused to hire an applicant for employment because of previous testimony before the National Labor Relations Board. Of course, in all of the above illustrations, the acts resulting in retaliation are presumed to be based on truthful allegations.

As shown above, motive has always been the central issue in determining whether retaliatory action has been taken. *NLRB v. Searle Auto Glass, Inc.*, 762 F.2d 769 (9th Cir. 1985). Numerous courts have held that discrimination or discharge of employees, regardless of their status, who have sought the benefits of the NLRA, whether through filing complaints thereunder or by giving testimony before the NLRB, is one of the most serious unfair labor practices. See, e.g., *NLRB v. Schill Steel Products*, 480 F.2d 586, 594 (5th Cir. 1973). When considering an action of retaliatory discharge or tortious interference several commentators have recognized that the critical element is "invariably that of justification." Holloway & Leech, *supra*, at 194. The focus is not on whether or not the alleged interference arises from truthful statements but whether they were utilized for an improper motive.

The federal labor law has long recognized the need for protective measures, sometimes provided by Congress – sometimes by the courts. In every case authorized by Congress to discourage retaliation, Congress determined that truth was not relevant; instead motive or justification, as found in *Pino v. Protection Maritime Ins.*, supra, was the factor focusing liability for interference. This Court, in its supervisory capacity over the admiralty, should not allow the Ninth Circuit's blind reliance on the Restatements to detrimentally impact the congressionally intended purpose of the Seaman's Wage Act. This was the same argument presented to this Court by the United

States as amicus curiae when it noted that the rights granted in the Act, and its intended purpose would be defeated if not allowed to apply to foreign seaman with equal force as Americans:

> "But such a plan would prove entirely abortive if the foreign seaman in our ports were unable to obtain sufficient money to carry him until he secured his next job and were compelled by his immediate necessities for food and lodging to remain with the foreign ship." Amicus Brief, at 12.

Similarly, the Wage Act is emasculated if foreign seamen are precluded from enforcing their rights against the vessel owner for fear of retaliatory action and blacklisting. Nothing but the fear of intervention by the U.S. courts will preclude unscrupulous shipowners from interfering with the future employability of these seaman. No seaman will sue under the Wage Act if he will never work again as a result thereof. The Seaman's Wage Act will be dormant and its policies and purposes unfulfilled.

This Court should grant certiorari to review the holding of the Ninth Circuit below in light of these cases, and to determine if, in fact, truth is an absolute defense to the tort of blacklisting.

B. The Narrow Interpretation of the Provisions of the Seaman's Wage Act and Failure to Assign Reasons for Reversal of the Award of Back Wages Due.

1. The Court of Appeals clearly erred when it failed to assign reasons for reversing the award of back wages.

The Ninth Circuit erred when it failed to assign any reasons whatsoever to the reversal of the trial court's

finding that $23,696 in back wages was due to the seamen. The district court found that there was $23,696.00 in back wages due the seamen, which included $15,019.20 in wages that were earned from January 20, 1990, until the date of final discharge of February 8, 1990. When the court of appeals discussed underpayment of wages, it seemingly found this finding was correct. However, when judgment was reversed and rendered by the court of appeals, the court of appeals reversed the award of back wages without any explanation whatsoever. Previously, another panel of the Ninth Circuit considered the amount of supersedeas bond for appeal noted that "the decision is far from clear" as to the amount of wages that had been paid or were due. The case was remanded to the district court for the limited purpose of resetting the bond and the district court was ordered to "determine whether the full amount of back wages (not including penalty wages or interest) has been tendered to the plaintiffs, or to any of them." Two weeks prior to the hearing on remand to set the supersedeas bond and determine the amount of wages due, the Defendants deposited $15,019.20 into the registry of the court as past due wages, to terminate the accrual of penalty wages in accordance with the Ninth Circuit opinion. At the hearing, Defendants contended there had been an overpayment of wages and Plaintiffs' contended wages were still due and owing. The district court made no determination as the parties stipulated to the amount of the supersedeas bond for appeal.

This Court clearly set forth in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), that the standard of review utilized by higher courts in determining the propriety of a district court's judgment is that the factual finding must not be "clearly erroneous," citing Federal Rules of Civil

Procedure, Rule 52(A). A finding is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573. The court of appeals clearly erred in its factual findings as it did in its legal analysis. Most disappointing, the court of appeals apparently feels that double bookkeeping in harbors of the United States is proper. The court noted, "It is also unclear what wrongful conduct the shipowners engaged in while in a United States port" in denying Petitioners' statutory claims for double wages. Discussing the maritime torts, the court concluded that maintaining double books and subjecting seamen to duress, coercion, and intimidation was not outrageous conduct that far exceeds the bounds of decency, but was really nothing more than "petty oppressions, or other trivialities."

2. The Court of Appeals narrowly interpreted the Seaman's Wage Act to defeat the cause of action for penalty wages thereunder.

The Seaman's Wage Act contains both a half wage statute (Subsection (e)) and a full wage statute (Subsection (f)). The half wage statute allows a seaman to demand one-half of his wages at any U.S. port and the failure of the shipowner to pay such wages results in the seaman being released from the shipping articles and entitled to full wages under Subsection (f), the full wage statute, with a consequence of double wages being due under Subsection (g). Also, the full wage statute Subsection (f) requires the payment of full wages "at the end of a voyage" and requires payment of the balance of the

wages "within 24 hours after the cargo has been discharged or within 4 days after the seaman has been discharged, whichever is earlier."

The trial court found that the seamen made a demand for one-half wages on each of the eight (8) separate voyages of the M/V Pine Forest to the United States by "plaintiffs' execution of the shipping articles and their signing the wage receipts for the wages set forth in the shipping articles constituted a legally sufficient demand for payment of wages." The court specifically noted:

> "The application of 46 U.S.C. § 10313(e) was triggered when plaintiffs' demand for payment of past wages earned and unpaid at each port at which the vessel discharged ballast was refused."

The Court had noted that the Defendants "never intended to comply with the shipping articles and ITF wage scale" and that "the seamen were in a very vulnerable position and were easily intimidated. The court expressly found the Defendants' requirement that Plaintiffs sign two sets of conflicting wage receipts "was repudiation of their contractual obligations to pay plaintiffs the wages set forth in the shipping articles and discharged by operation of law, plaintiffs duty to make a formal demand for wages."

The Ninth Circuit noted the applicability of the half wage statute to foreign vessels stating:

> "Each time a foreign vessel takes on or discharges cargo in a United States port, the foreign crew may invoke the Act's half wage provision. If the master refuses to pay, the men may invoke the full wage provision. Foreign vessels cannot avoid the Act simply by insuring that they never complete a voyage in a United States port."

However, the Ninth Circuit opinion expressly allows foreign vessels to avoid the Act by duress, intimidation, and coercion – acts that the district court expressly found to exist in the instant case. The Ninth Circuit found that the seamen's demand for half wages was ineffective and failed to "notify the ship's master of the crew's claims", even though the shipowner knew the exact amount of wages due by virtue of the required fake wage receipts that were not honored. The Ninth Circuit was wrong in ignoring the factual findings of the district court and substituting its own definition of "demand".

The Ninth Circuit likewise redefined "voyage" and "cargo" in interpreting the full wage statute in the most favorable position to the shipowner, and not the seaman whom it was enacted to protect. The Ninth Circuit redefined "end of voyage" for the purposes of the full wage statute stating:

> "A seaman's voyage ends when his commitment to work aboard the ship is terminated, either by completion of his contract or by premature discharge."

While this definition may certainly be partially true, the Ninth Circuit attempts to completely write out of the jurisprudence the established rule that a voyage is a complete one way trip, and in some circumstances a round trip. In litigation involving the Limitation of Liability Act, 46 U.S.C. § 183, et seq., a voyage is normally held to be a one way trip for the unit for claims as well as values to be surrendered. *La Bourgogne*, 210 U.S. 95 (1908); *The Black Eagle and Concordia*, 87 F.2d 891 (1937). It is anomalous to only require a shipowner to post pending freight from the last one way trip to minimize its financial exposure in seeking the protection of 46 U.S.C. § 183 and to impose an entirely different definition of a voyage to

prohibit a seaman from obtaining the protection of the Seaman's Wage Act. In so doing, the Ninth Circuit has created a great conflict with the previous holdings of this Court and the circuit courts of appeals.

A conflict further exists as to whether there is any necessity of a voyage for the application of 46 U.S.C. § 10313(f). In *Chung Yong Il v. Overseas Navigation Co.*, 774 F.2d 1043 (11th Cir. 1983), *cert. denied* 474 U.S. 1177 (1986) (White, J., dissenting from denial of certiorari). The Ninth Circuit held that there was a strict voyage requirement: "As we read *Griffin* and *Chung*, however, neither ignores the voyage requirement." The statement is unconvincing in light of the unambiguous language of the Eleventh Circuit:

> "Although the statute does call for payments to be made at a certain time, depending on the kind of voyage, nothing in the statute mandates that the vessel commence and complete a voyage in which the seamen participated before the seaman is entitled to penalty wages. *If congress had intended to impose a voyage requirement, it could have chosen clearer language than it did. The purpose of the statute would hardly be furthered by our imposing such a requirement, and we decline to do so.*" [Emphasis added]

This Court as well as other courts has not given any consideration to the voyage as an element of recovery. For example, in *Pacific Mail S/S Co. v. Schmidt*, 241 U.S. 245 (1916), the seaman at the end of a foreign voyage received full payment of his wages earned on the voyage of September 24, 1913, the last day of the voyage. Seaman Schmidt stayed on the vessel while it was in port and worked until he was discharged on October 1, 1913. Schmidt demanded his wages from September 24 until October 1 but was denied payment. This Court did not

question the right of the seamen to wages or an action under the Wage Act for these wages. The sole issue on appeal was the award of penalties during the pendency of the appeal. See also, *Griffin v. Oceanic Contractors, supra*; cf., *Burie v. Overseas Navigation Corp.*, 205 F.Supp 182 (S.D.N.Y. 1962) (articles of employment can terminate in the middle of a voyage).

The Ninth Circuit erred when it determined that the definition of cargo did not include ballast for the purpose of the wage statute. The panel admits that the language of the statute is "ambiguous at best" and that conflicting jurisprudence has interpreted the word "cargo" in different ways. The definition of "cargo" is of exceptional importance and that the impact of this particular part of the decision is even now being felt around the country as the latest and only interpretation in the national jurisprudence of this aspect of the statute. Under the panel's rule, a foreign ship, such as the M/V Pine Forest, doing 100% of its business in the United States is immune from the provisions of the statute if it only takes cargo from the United States. This effectively nullifies the provisions of the statute and its underlying policy which is to make the law equally applicable to American shipowners and foreign shipowners who enter American ports. A. Bickell, *Strathearn S.S. Co. v. Dillon: An Unpublished Opinion*, 69 Har.L.Rev. 1177 (Justice Brandeis' unpublished opinion in *Strathearn v. Dillon*); see also Amicus Brief of the United States in *Strathearn SS Co. v. Dillon*.[10] The panel's distinction of ballast with value being cargo, but ballast without value not being cargo does not serve the legitimate goals of the statute. It is a mere fluke of technology that ballast

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[10] See note 8 *supra*.

has ceased to be valuable. The idea of pumping seawater into the cargo holds of a ship in 1872 when the word ballast was removed from the statute would have been insane. The later development, whose use facilitated modern ships, is now being used to obviate the statute. By allowing this development of technology to interfere with the application of the statute, the Ninth Circuit is effectively allowing time and technology to become a third house of congress capable of amending laws by a mere twist of fate.

Even if the Ninth Circuit's definition of cargo is correct, the wage statute was applicable on the facts before the court. The M/V Pine Forest did in fact discharge cargo in a foreign port, and that coupled with non-payment of wages in a U.S. port renders the full wage statute applicable. There is no language whatsoever in the wage statute that requires either the cargo or the seamen to be discharged in a U.S. port. The statute requires that the wrongful conduct, that is the non-payment of wages, occur in a U.S. port while the foreign seaman is on the vessel. These facts occurred and the statute is applicable.

This adverse opinion of the Ninth Circuit Court of Appeals impacts the very application of the wage statute throughout the United States and is in conflict with decisions of other circuits and this Court. This Court should grant Petitioners' writ of certiorari in light of the existing conflict and the previous liberal interpretation given the wage statute, 46 U.S.C. § 10313.

CONCLUSION

This Honorable Court should grant writs to review the decision of the Ninth Circuit Court of Appeals opinion below in accordance with the Questions Presented herein.

Dated this 5th day of February, 1993.

Respectfully Submitted:

RICHARD J. DODSON
La. Bar Roll No. 4982
DODSON, BULLOCK & VIDRINE
A PROFESSIONAL LAW CORPORATION
628 North Boulevard
Baton Rouge, Louisiana 70802
Telephone: (504) 344-0633

I. Hyeon SU; Seong Gu, et al.; Gim Yeong Ho; Park Min Ho, et al.; Barg Yeong Pal; Seo Jeom Tae; Lee Sil Gwang; Jung Ju Goang; Ji Je Je; O Han Seon; Son Chi Il; Choi Weon Il; Chu Chae Sok; Kig Og Nam; Han Bag Kil; Pyeon Yun Su; Park Sung Ok; Ka Chae Ho; Federated Korean Seamen's Union, et al., Plaintiffs-Appellants,

v.

M/V SOUTHERN ASTER; Southern Aster Navigation, S.A., Defendants-Appellees.

Edwin A. JOSE, Plaintiff,

and

Perfecto C. Lim; Buen B. Esclamado; Crescencio I. Napao; Tomas N. Rosles Je; Hermiles S. Pinoon, Applicants in intervention-Appellants,

v.

M/V FIR GROVE; Delica Shipping, S.A.; Inui Steamship Co., Ltd. Defendants-Appellees.

Nelson R. RABY; Teofanis F. Roz; Apolonio H. Torreliza; Associated Marine Officers & Seaman's Union of the Philippines; S. Galua; Boifacio C. Tabada, et al.; Leo C. Ajero; Teodulo R. Rabie; Marcelo G. Suarez; Miguelito A. Cabales, et al., Plaintiffs-Appellees,

v.

M/V PINE FOREST; Delica Shipping, S.A.; Inui Steamship Co., Ltd., Defendants-Appellants.

Nos. 90-35485, 90-35486, 90-35706, 90-35618, 90-35879, 91-35375.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 17, 1992.

Decided Oct. 14, 1992.

Richard J. Dodson, Baton Rouge, La., John W. Buehler, Bullivant, Houser, Bailey, Pendergrass & Hoffman, Seattle, Wash., Robert M. Weinberg, Virginia A. Seitz, John West, Bredhoff & Kaiser, Jeremiah H. Collins, Susan D. Carle, Washington, D.C., I. Franklin Hunsaker, for plaintiffs.

Robert I. Sanders, Wood, Tatum Wonacott & Landis, Joe D. Bailey, Kathleen A. McKeon, Portland, Or., Joseph S. Stacy, Le Gros, Buchanan, Paul & Whitehead, William R. Bishin, Seattle, Wash., Kim Jeffries, Portland, Or., for defendants.

Appeal from the United States District Court for the District of Oregon.

Appeal from United States District Court for the Western District of Washington.

Before: WRIGHT, BEEZER, and LEAVY, Circuit Judges.

EUGENE A. WRIGHT, Senior Circuit Judge.

These consolidated cases test the bounds of the Seamen's Wage Act, 46 U.S.C. § 10313 (1988). The Wage Act protects seafarers from the efforts of unscrupulous shipowners to take advantage of their superior economic position to withhold payment of promised wages. Each case requires us to resolve this question: Do the Wage

Act's protections extend to foreign crews discharged from foreign ships in foreign ports? Although Congress likely could have extended the Wage Act this far, we conclude that it did not. The structure, history and, more important, the plain language of the Act all point to this result. Congress must speak clearly to overcome the strong presumption against extraterritorial application of United States law, and this it has not done.

I

Seamen from three Japanese log-carrying ships (the PINE FOREST, FIR GROVE and SOUTHERN ASTER) insist that they were systematically underpaid. The shipowners concede that they paid less than union wages, but say the crew agreed to the lower wages and further agreed to help the shipowners mislead union inspectors intent on uncovering such underpayments.

Underlying the men's claims is an ongoing dispute between shipowners and the International Transport Workers Federation, an umbrella labor organization of affiliated seafarers' unions. The unions seek to maintain worldwide wage rates that far exceed what seafarers from undeveloped countries demand.

The shipowners cannot merely ignore the unions, however, for if the owners fail to pay the union rate, the unions will sometimes interfere with the loading or unloading of the ships. To avoid this, the shipowners must demonstrate compliance with union rules and, in return, the unions award the ships protection in the form of a "Blue Certificate". By showing a Blue Certificate,

ships can forestall union hostility while in port. Shipowners have devised a scheme to obtain Blue Certificates without paying union wages. They keep two sets of books on each ship. One set records the actual wages paid and the other records union scale wages. Seamen memorize the union scale and the ships' masters instruct the crew to lie to union inspectors, telling them that the crew are receiving full union wages.

In the ship's articles, only the union wages are recorded. When the men are paid, they sign two receipts: one records the actual wages and the other shows union wages. This so-called "double-bookkeeping" scheme was used in an effort to deceive the unions on all three ships in this consolidated appeal.

A. The PINE FOREST

The PINE FOREST flew the flag of the Republic of Vanuatu,[1] was operated by a Japanese firm, and was owned by a Panamanian corporation which in turn was beneficially owned by Japanese citizens and companies. It carries logs from the United States to Japan; from Japan to the United States it carries only seawater as ballast.

The PINE FOREST entered service in March 1989 with a crew of nineteen Filipino seafarers. Two others joined the ship later. The men signed 12-month contracts

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[1] Apparently, the Republic of Vanuatu is to shipowners what Delaware is to coporate executives. Vanuatu is well-known for its unintrusive admiralty law. Despite its small size, it has about 400 registered merchant vessels. Paul K. Chapman, *Trouble on Board* 99 (1992).

in the Philippines, were told what they would be paid, and joined the ship in Japan. Each man signed the PINE FOREST's shipping articles, which recited that it abided by the union collective bargaining agreement specifying wages that far exceeded what they had been promised in the Philippines. Each was told, however, that he would in fact receive the lower wages originally promised and that he would be expected to help the shipowners deceive the union.

From March 1989 until the end of January 1990, the PINE FOREST sailed back and forth between Japan and the United States, completing eight trips. At each month end, the crew members received their wages and signed receipts for their actual wages and the higher union wages.

The scheme fell apart while the PINE FOREST was in port in Tacoma. On January 30, 1990, eleven of the crew members filed a complaint demanding full union wages. Their attorneys had the vessel arrested. Shortly thereafter, two other crew members signed the complaint. The union later added the remaining eight seafarers to the complaint, but these eight never signed or verified it.

The thirteen who signed the complaint left the PINE FOREST on February 8, after their replacements arrived. In their seamen's books, which they must take to each new vessel, the master recorded the reason for discharge. "Requested repatriation upon filing wages claim to arrest vessel." The other eight crew members remained aboard the PINE FOREST, completed their year of service, and left the vessel in Japan.

On February 13, the shipowners tendered $267,586 as the amount due the thirteen crew members who had left the ship. The seafarers divided and accepted this payment but later contended it was insufficient. The court set bond at $19,000,000, which the shipowners posted to release the vessel.

At trial, the plaintiffs succeeded on both statutory and maritime tort claims. The court awarded the seafarers $32,657,536, divided as follows:

Thirteen plaintiffs discharged in United States:

1.	Back Wages	23,696
2.	Statutory Penalties	4,191,671
3.	Loss of Future Income	6,800,470
4.	Emotional Distress	1,300,000
5.	Punitive Damages	13,000,000

Eight plaintiffs discharged overseas:

1.	Back Wages	142,236
2.	Statutory Penalties	2,799,463
3.	Loss of Future Income	0
4.	Emotional Distress	400,000
5.	Punitive Damages	4,000,000

The court also awarded attorneys' fees, relying on *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962).

B. The SOUTHERN ASTER

The SOUTHERN ASTER, like the PINE FOREST, was a Japanese-owned log-carrier that transported United States logs to Japan. The crew was Korean rather than Filipino, and were represented by the Korean affiliate of the International Transport Workers Federation.

The crew joined the ship in Japan in March 1988, worked for about a year, then disembarked in Japan. During that year, the SOUTHERN ASTER made eight trips to the United States. It operated the same double-bookkeeping scheme as the PINE FOREST, paying the crew a lower wage than the union rate contained in the ship's articles.

On February 21, 1990, plaintiffs' attorneys had the SOUTHERN ASTER arrested in Coos Bay, Oregon, after filing a complaint for back wages on behalf of the absent crew. The district court set bond, which the shipowners posted to release the vessel.

The district court dismissed the case, granting the shipowners' 12(b)(6) motion on the statutory claims and dismissing the remaining claims on the ground of *forum non conveniens*. The court was not persuaded that the statute applied to foreign seafarers discharged in foreign ports from foreign-owned and flagged vessels. The shipowners agreed to submit to the jurisdiction of a Korean court as a condition of dismissal.

C. The FIR GROVE

The FIR GROVE was a sister ship of the PINE FOREST. It too employed a Filipino crew, flew the Vanuatu flag, and was beneficially owned by the Japanese.

In January 1989, the crew joined the FIR GROVE in Japan. They had been recruited in the Philippines and had agreed to a 12-month term of service. Over the next year, the FIR GROVE completed six trips between Japan and the West Coast, carrying logs to Japan and carrying ballast on the return trip. On these trips, the shipowners maintained the same double-bookkeeping scheme as on the PINE FOREST.

On the seventh trip, twelve crew members had the ship arrested in Coos Bay after filing a complaint for back wages, totalling about $300,000. Two other crew members later joined the complaint. The shipowners paid the back wages under a reservation of rights, and posted a bond to release the FIR GROVE. These fourteen seamen were discharged in Oregon.

Counsel moved for leave to file an amended complaint adding five more crew members who had not verified or signed the complaint and who had not been discharged in Coos Bay. These five stayed on the vessel, completed their year's obligation, and left the ship in Japan.

The court denied the motion, but allowed the five to apply for intervention. They did but the court refused their application, reasoning that their statutory claims were barred because they had been discharged in a foreign port. These five appeal the judgment denying their motion to intervene.

II

The Seamen's Wage Act, 46 U.S.C. § 10313, protects seafarers by ensuring they receive timely payment of

wages. The Wage Act's full wage provision requires prompt payment of wages at the completion of a voyage:

> At the end of a voyage, the master shall pay each seafarer the balance of wages due the seafarer within 24 hours after the cargo has been discharged or within 4 days after the seafarer is discharged, whichever is earlier. . . . When payment is not [timely] made . . . without sufficient cause, the master or owner shall pay to the seafarer 2 days' wages for each day payment is delayed.

46 U.S.C. §§ 10313(f), (g). Necessary to recovery under this provision is a showing that (1) the voyage ended, (2) either the cargo or the seafarer has been discharged, and (3) payment was withheld without sufficient cause.

The Wage Act's half-wage provision also covers partial payments each time a ship stops in port to load or unload cargo:

> After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. . . . If a master [fails to pay], the seaman is released from the agreement and is entitled to payment of all wages earned.

46 U.S.C. § 10313(e). The seaman must show that the master refused the man's demand for half-wages. Once the master refuses to pay, full wages become due, and if not paid, the seafarer may be entitled to double wages for each day's delay. *In re Williams*, 139 F.2d 262, 263 (4th Cir.1943).

The Wage Act also has an important jurisdictional provision, extending the Act's protections to seafarers on foreign ships when in a United States harbor:

> This section applies to a seafarer on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

46 U.S.C. § 10313(i).

A. Underpayment

The seafarers bear the burden of showing that the shipowners paid less than the full amount of wages due. The shipowners half-heartedly contend that the seafarers have no claim because they received the wages promised by the manning agency. The owners suggest that the higher rate shown in the shipping articles does not govern the seafarers' wages, because the men knew they would never be paid that amount.

It is well-established, however, that the shipping articles govern the contract of employment between the seamen and the master, and parol evidence to vary the terms of the articles is permitted only to show that the articles were fraudulently changed by the seafarers. *See* Martin J. Norris, *The Law of Seamen* §§ 6:1, 6:31 (4th ed.1985); *Northwestern S.S. Co. v. Turtle,* 162 F. 256, 258 (9th Cir.1908). In short, once the shipowners executed the shipping articles in furtherance of the double-bookkeeping scheme, they were bound to pay the rate recorded in the articles rather than the lower rate promised before the voyage.

B. Foreign seafarers discharged in United States ports

The Wage Act's jurisdictional provision makes clear that foreign seafarers discharged in an American port may invoke the Act's protections. The issue for these men is not whether they are entitled to seek back wages under the Act, but rather when the Act's protections were triggered and, based on that determination, what if any statutory penalties are due.

The PINE FOREST court awarded the 13 seafarers discharged in the United States over $4,000,000 in statutory penalty wages, finding that the Wage Act's protections were triggered each time it reached port. It reasoned that each leg of the trip was a voyage and the seawater ballast qualified as cargo.

1. Ballast as cargo

To trigger the protections of the Wage Act's full wage provision, the seafarers must show they were not timely paid at the end of their voyage. Timely payment under the statute means payment within 24 hours of discharging the ship's cargo or within four days of the seafarer's discharge, whichever is earlier. The definition of "cargo" under the statute is important for, assuming each trip from Japan to the United States constituted a voyage, if the seawater carried as ballast on those trips qualifies as "cargo," penalties started accruing at the end of each trip.

The Act leaves the term "cargo" undefined. No court has answered the question whether seawater ballast is

cargo under the Act. Precedent from other contexts, common definitions and common sense, however, suggest that seawater ballast is not cargo.

Black's defines *ballast* as "[t]hat which is used for trimming a ship to bring it down to a draft of water proper and safe for sailing." *Black's Law Dictionary* 181 (4th ed. 1951). *Cargo*, on the other hand, is

> [t]he load or lading of a vessel; the goods, merchandise, or whatever is conveyed in a ship or other merchant vessel. While "cargo" is primarily the load of the ship, it may have a varying meaning. The term may be applied in such a sense as to include passengers, as well as freight, but in a technical sense it designates goods only.

Id. at 268 (citations omitted). Non-law dictionaries similarly distinguish the two, defining ballast as "[a]ny heavy material placed in the hold of a ship . . . to enhance stability", and cargo as "[t]he freight carried by a ship. . . . " *See, e.g., American Heritage Dictionary* 102, 204 (1976). Freight is defined as "[g]oods carried by a vessel or vehicle; lading." *Id.* at 525.

Courts have also treated the two as distinct. Many have noted, for example, that ships carrying ballast are "without cargo". *See The Pedro*, 175 U.S. 354, 381, 20 S.Ct., 138, 148, 44 L.Ed. 195 (1899), *rev'd on other grounds, The Buena Ventura v. United States*, 175 U.S. 384, 20 S.Ct. 148, 44 L.Ed 206 (1899); *United States v. Alvarez-Mena*, 765 F.2d 1259; 1261 (5th Cir. 1985); *Pacific Far East Line v. United States*, 394 F.2d 990, 994, 184 Ct.Cl. 169 (1968); *Oliver J. Olsen & Co. v. Luckenbach S.S. Co.*, 279 F.2d 662, 672 (9th Cir.) *cert. denied*, 364 U.S. 881, 81 S.Ct. 171, 5 L.Ed.2d 103

(1960); *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F.Supp. 73, 73 (S.D.N.Y.1986), *rev'd on other grounds*, 830 F.2d 421 (2d Cir.1987), *rev'd*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *McGhee v. United States*, 75 F.Supp. 76, 78 (S.D.N.Y.), *modified*, 165 F.2d 287 (2d Cir.1947).

A very few cases have considered ballast as cargo, but in those instances the ballast was something of value. For example, in *Lo Bue v. United States*, 75 F.Supp. 154, 154 (E.D.N.Y.1947), the court referred to a "cargo" of slag ballast. *See also New York Trap Rock Corp. v. Christie Scow Corp.*, 165 F.2d 314, 316 (2d Cir.1948) (unloading of "cargo" of ballast to a second ship for further transport). In none of these cases was the ballast simply worthless seawater.

An earlier version of the full wage provision provided for payment after the discharge of "cargo or ballast", but Congress later deleted the reference to ballast. *Compare* Seaman's Wage Act, ch. 29, § 6, 1 Stat. 133 (1790) *with* Shipping Commissioners' Act of 1872, ch. 322, § 35, 17 Stat. 269 (1872). Congressional intent underlying the revision is at best ambiguous. The reference to ballast may have been viewed as redundant. Yet coincident with the change, Congress added the discharge of the seafarer as a triggering event. In light of this added protection, it may have decided ballast discharge was no longer necessary as a triggering event.

We conclude that worthless seawater carried as ballast does not constitute cargo as envisioned by the Wage Act. Cargo is freight or goods that have some value. Even if each leg of the trip could be considered a separate

voyage, the Act's protections were not triggered when the log-carriers dumped their load of seawater on arrival in an American port.

2. Each trip as a voyage

Like "cargo", "voyage" is not defined in the Wage Act. The PINE FOREST court defined each leg of the trip as a voyage. We conclude that such a definition conflicts with the structure and language of the Act.

The Act contains both full and half wage provisions. The latter is triggered at every port in which the ship takes on or discharges cargo. We doubt Congress could have intended the broad definition of a voyage adopted by the PINE FOREST court. Defining a voyage as each leg of a trip renders the half wage provision meaningless, for under that definition the full wage provision could be invoked any time the half wage provision could apply.

The seamen insist, though, that courts have read the "end of voyage" requirement out of the statute. They rely on several recent decisions in which courts have held that the full wage provision applied though the ship never left port. For example, in *Griffin v. Oceanic Contractors*, 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982), Griffin suffered an injury shortly after joining the vessel and before it sailed. Although the Court did not expressly consider whether he met the voyage requirement, it granted him relief under the full wage provision. *Id.* at 577, 102 S.Ct. at 3253.

In *Chung, Yong Il v. Overseas Navigation Co.*, 774 F.2d 1043 (11th Cir.1985), *cert. denied*, 475 U.S. 1147, 106 S.Ct.

1802, 90 L.Ed.2d 346 (1986), the court explicitly considered the issue. Like *Griffin*, the *Chung* crew were discharged after spending time on a ship that never left port. The court held that the voyage requirement did not preclude these men from invoking the full wage provision. *Id.* at 1051.

As we read *Griffin* and *Chung*, however, neither ignores the voyage requirement. Instead, they define voyage to further the Wage Act's protective purpose. A seaman's voyage ends when his commitment to work aboard the ship is terminated, either by completion of his contract or by premature discharge. *See, e.g., Mavromatis v. United Greek Shipowners Corp.*, 179 F.2d 310, 318-19 (1st Cir.1949); *The Cubadist*, 252 F. 658, 660, 662-63 (S.D. Ala. 1918), *aff'd*, 256 F. 203 (5th Cir.), *cert. denied*, 249 U.S. 618, 39 S.Ct. 392, 63 L.Ed. 804 (1919). Under this definition the *Griffin* and *Chung* seafarers had completed their voyages when they were discharged, even though the ships never left port.

Applying this definition, the PINE FOREST seafarers were not entitled to full wages each time the ship stopped in the United States or Japan. Rather, full wages became due four days after they were discharged following the filing of the complaint. Although they had not completed their contractual obligations, their voyages terminated when they were discharged.

C. Foreign seafarers discharged in foreign ports.

We start with the well-established principle that, absent a clearly expressed intent to the contrary, United

States statutes apply only within the territorial jurisdiction of the United States. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949). "We assume that Congress legislates against the backdrop of that presumption against extraterritoriality." *EEOC v. Arabian Am. Oil Co.*, ___U.S. ___, ___, 111 S.Ct. 1227, 1230, 113 L.Ed.2d 274 (1991). Because we find no clearly expressed intent to contradict this presumption, logic dictates that the full wage provision should not apply to foreign seafarers discharged from foreign ships in foreign ports.

This result is consistent with the plain language of the Wage Act, which is the clearer evidence of the Act's jurisdictional limits. The Act is part of Chapter 103 of Title 46, which notes that "[u]nless otherwise provided, this chapter does not apply to a foreign vessel." 46 U.S.C. § 10301(c). Against this background, the Act makes an exception for foreign vessels in American ports: "This section applies to a seafarer on a foreign vessel when in a harbor of the United States." *Id.* § 10313(i).

Nevertheless, the seafarers contend that crew members discharged overseas may recover under the Wage Act. They suggest that limiting the Act to foreign ships in United States ports thwarts one of the Act's underlying purposes. In their view, the jurisdiction limiting clause cannot really mean what it says. Alternatively, they insist that if some conduct facilitating the later withholding of wages occurred in an American port, the jurisdiction requirement is met.

They find some support in the case law. We have never decided the issue, and there is directly conflicting

authority among the districts in this circuit. In *Galon v. M/V Hira II*, 1990 A.M.C. 342, 1989 WL 211484 (W.D.Wash.1989), the court ruled without further analysis that "the statute does not require discharge in a United States port." *Id.* at 343. Shortly thereafter, the court in *Mateo v. M/S Kiso*, No. C-902357-DLJ ___ F.Supp. ___ (N.D.Cal.1991), held to the contrary, finding discharge in a United States port a prerequisite to applying the statute.

Confusion on this issue is not limited to this circuit's district courts. Some other courts have been willing to extend the Act to foreigners discharged in foreign ports. In *Ventiadis v. C.J. Thibodeaux & Co.*, 295 F.Supp. 135 (S.D.Tex.1968), the court held that "to limit [the Act] only to instances in which the seafarer is discharged in an American port would be to unreasonably restrict its effect." *Id.* at 138; *see also Fitzgerald v. Liberian S/T Chryssi P. Goulandris*, 582 F.2d 312, 314 (4th Cir. 1978) (extraterritorial discharge does not preclude application of the Act).

Other courts have followed the view expressed in dictum by Judge Friendly in *Monteiro v. Sociedad Maritima San Nicolas, S.A.*, 280 F.2d 568 (2d Cir.), *cert. denied*, 364 U.S. 915, 81 S.Ct. 272, 5 L.Ed.2d 228 (1960). Judge Friendly reasoned that "[t]he natural reading is rather that a seafarer on a foreign vessel obtains his right once the specified facts occur while the vessel is in a harbor of the United States. . . . " *Id.* at 574; *see also Cubeiro v. Sun Seaway Enters.*, 539 F.Supp. 1175, 1177 (S.D.N.Y.1982) ("[I]t is now well settled that a foreign seafarer, sailing on board a foreign-flag vessel, may file a [wage] claim in a United States court . . . if he was discharged from the vessel in a United States port. . . . However, it is equally

clear that for the statute to apply, the discharge must have taken place in a United States port."); *Barcelona v. Sea Victory Maritime,* 1992 A.M.C. 369, 372, 1991 WL 323803 (E.D.La.1991) (discharge must be in United States port); *Angad v. M/V Fareast Trader,* 1989 A.M.C. 2721, 2728, 1989 WL 201605 (S.D.Tex.1989) (wages can accrue anywhere, but withholding of payment must be in United States port).

The seafarers argue that if this court adopts Judge Friendly's view, it will confound one of the Act's underlying purposes. Congress was primarily concerned with protecting seafarers when it enacted these provisions. *Griffin,* 458 U.S. at 572, 102 S.Ct. at 3250. But Congress also sought to enhance the competitiveness of American shippers. It worried that subjecting only United States flag vessels to the wage provisions would put United States shipping at a competitive disadvantage. To level the playing field, it extended the Act to foreign vessels. 50 Cong. Rec. 55748-49 (Oct. 22, 1913).

Had Congress wanted to include all foreign vessels, however, it could have done so expressly. The language of the Wage Act is clear. It applies only to foreign vessels in United States ports. To let one of the Act's underlying purposes trump the statute's plain language would violate a basic tenet of statutory construction. *Cf. Commissioner v. Brown,* 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965) (purpose can override plain language only in an exceptional case).

But the seafarers also contend that the final withholding of wages was part of an ongoing scheme by the

shipowners, during the entire course of a voyage. Conduct integral to the scheme occurred while the ships were in United States harbors, say the seafarers, thus satisfying the Act's jurisdictional requirement.

Under this theory, a single pause at a United States port during the course of a three-year voyage would trigger the protections of the Wage Act. Such an expansive reading contradicts the Act's plain language. Nor is such a broad reading necessary to further the Act's purpose of equalizing shipping costs between foreign and United States vessels. Each time a foreign vessel takes on or discharges cargo in a United States port, the foreign crew may invoke the Act's half wage provision. If the master refuses to pay, the men may invoke the full wage provision. Foreign vessels cannot avoid the Act simply by ensuring that they never complete a voyage in a United States port.

It is also unclear what wrongful conduct the shipowners engaged in while in a United States port. The Act imposes harsh penalties but only for specific, well-defined conduct: the wrongful withholding of wages. Until that occurs, the Act's protections are unavailable. For those seamen discharged overseas, that prohibited conduct did not occur in a United States port.

D. Demand for half wages

The seafarers insist that even if they cannot obtain relief under the full wage provision, they can invoke section 10313(e), the half wage provision. This section allows crew members to claim half their accrued wages

when they are in a United States port loading or unloading cargo. The difficult issue of jurisdiction over foreign crews in foreign ports does not arise here, because each of the three ships loaded cargo in United States ports.

The key to the seamen's claim is whether they made an effective demand for half wages, as the Act requires. They insist they did, by executing wage receipts. They would have us believe that each time they signed a false receipt acknowledging payment of union scale wages, they were in fact demanding payment at that rate.

But for a demand to be effective, it must plainly and unequivocally request payment. "The demand must be plainly made so that the master will know exactly what is demanded of him, and since if he refuses the payment of the half wages, all of the wages then become due, it becomes obvious that clarity in the making of the demand is essential." Martin J. Norris, *The Law of Seamen* § 17:33 (4th ed. 1985); *see also In re Ivertsen*, 237 F. 498, 501 (N.D.Cal.1916).

Signing wage receipts as part of the double-bookkeeping scheme falls far short of an effective demand, for it fails to notify the ships' masters of the crews' claims. It would more easily have been interpreted as acceptance of the double-bookkeeping scheme rather than a demand for higher wages.

The seamen virtually admit this, saying that had they made their demands explicit, they would have been terminated. To allow such a hidden demand to satisfy the demand requirement would effectively eliminate it.

E. Summary of statutory claims

1. The PINE FOREST

The PINE FOREST crew discharged in the United States are entitled to back pay at the full union scale described in the ship's articles. The shipowners paid this amount when they tendered $267,586. The court erred in assessing penalties based on the mistaken conclusion that each trip was a voyage and that ballast was cargo.

The PINE FOREST crew discharged overseas are not covered by the Wage Act's full wage provision and did not make an effective demand for half wages. The court erred in awarding them back wages and statutory penalties.

2. The SOUTHERN ASTER

All the seamen were discharged overseas. The court did not err when it dismissed their statutory claims, nor did it abuse its discretion when it dismissed their tort claims on the grounds of *forum non conveniens.*

3. The FIR GROVE

The five FIR GROVE seamen seeking intervention were all discharged overseas. The court properly denied intervention.

III

Besides awarding back wages and statutory penalties, the PINE FOREST court also awarded substantial

tort damages. The court granted the crew $8.5 million in compensatory damages and punitive damages totalling $17 million. Yet neither the court's findings nor the evidence underlying them supports any of the tort theories on which the award is based.

A. Fraud

As a court sitting in admiralty, we look to the common law in considering maritime torts. *Guidry v. Durkin*, 834 F.2d 1465, 1470 (9th Cir.1987). We turn then to Washington's definition of fraud and its nine elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) an intent that it be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) reliance on its truth; (8) the right to rely thereon; and (9) consequent and proximate injury. *Markov v. ABC Transfer & Storage Co.*, 76 Wash.2d 388, 457 P.2d 535, 539 (1969). Each element is essential; if any is missing, the entire claim fails. *Id.*

The seafarers suggest that there were several misrepresentations that support a finding of fraud: (1) the shipowners planned to lie to union inspectors about the wage rates; (2) the manning agency told the seafarers they would receive a wage close to the union rate; and (3) the shipowners deliberately misled the seafarers about their rights to receive the union wage.

The shipowners admit an intent to deceive the union. This amounts to an intended misrepresentation to the seamen, say the crew, because of their relationship with the union. The union represented them. Under well-

established principles of agency law, an attempt to deceive an agent ordinarily constitutes an attempt to deceive the principal. Restatement (Second) of Agency § 315 (1957). Yet if the principal knows the true facts, the attempted deception may not be imputed to the principal. These seamen not only knew the facts but had agreed to help the shipowners to carry out the deception by lying to union inspectors. To call this a misrepresentation to the seafarers would stand agency law on its head.

The seamen argue, however, that even though they were a party to the misrepresentation, it nevertheless deprived them of one of the essential benefits of union representation. By negotiating a deal behind the back of the union, the owners undercut the union's role as the seamen's representative. Maybe so, but it is not fraud on the seafarers.

The men also insist that the manning agency misrepresented that they would be paid a wage that approximated the union wage. The court's express findings refute this. It found that the shipping articles "contained a significantly higher pay scale than the oral representations made to plaintiffs by [the manning agency]." Ample testimony by the seafarers supports this finding.

Finally, the seafarers say that the shipowners' failure to tell them that they were entitled to higher wages was a misrepresentation. The court's findings do not support this theory, nor are we willing to hold that this was a representation, let alone a misrepresentation.

The failure to show a misrepresentation is alone enough to undermine the seamen's claim of fraud, but they also failed to show either reliance or the shipowners'

intent to induce reliance on any alleged misrepresentations. Accordingly, we conclude that there was no fraud.

B. Outrage

The claims of intentional infliction of emotional distress are based both on the notations made in the seamen's books and their participation in the double-bookkeeping scheme.

To prove intentional infliction of emotional distress, the seafarers must show that: (1) the conduct complained of was extreme and outrageous; (2) the distress was intentionally or recklessly inflicted; and (3) they suffered actual severe emotional distress. *Rice v. Janovich,* 109 Wash.2d 48, 742 P.2d 1230, 1238 (1987); Restatement (Second) of Torts § 46 cmt. d (1965) (hereafter, "Restatement").

> To be outrageous conduct, it must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Restatement § 46 cmt. d; *see also Contreras v. Crown Zellerbach,* 88 Wash.2d 735, 565 P.2d 1173 (1977) (adopting cmt. d). It is not enough that the conduct was maliciously, tortiously or criminally intended.

Several factors bear on the determination whether the alleged conduct meets this standard:

(1) the position occupied by the defendants;

> (2) whether plaintiffs were particularly susceptible to emotional distress, and if defendant knew this fact;
>
> (3) whether defendants' conduct may have been privileged under the circumstances;
>
> (4) whether the degree of emotional distress caused by a party was severe as opposed to mere annoyance, inconvenience, or normal embarrassment; and
>
> (5) whether the actor was aware that there was a high probability that his or her conduct would cause severe emotional distress and proceeded in a conscious disregard of it.

Spurrell v. Bloch, 40 Wash.App. 854, 701 P.2d 529, 535, *review denied,* 104 Wash.2d 1014 (1985).

1. The discharge notations

The PINE FOREST's master entered the reason for discharge in each of the thirteen seafarer's books: "Requested repatriation upon filing wages claim to arrest vessel." This alone does not constitute outrageous conduct.

It is, rather, an accurate reflection of events. These thirteen men had requested repatriation after filing wage claims to arrest the vessel. Accurate statements about an employee's performance generally do not constitute outrage. *Dicomes v. State,* 113 Wash.2d 612, 782 P.2d 1002, 1013 (1989).

Furthermore, "[t]he actor is never liable . . . where he had done no more than insist upon his legal rights in a permissible way, even though he is well aware that such

insistence is certain to cause emotional distress." Restatement § 46 cmt. g. The master did no more than record an accurate statement of the reason for discharge and the conduct does not rise to the level of outrageous conduct.

2. The double-bookkeeping scheme

The seamen claim distress from their participation in the double-bookkeeping scheme. Yet they failed to show either that the conduct was outrageous or that they suffered any severe emotional distress.

Outrageous conduct far exceeds the bounds of decency. As the Restatement explains, it takes more than "mere insults, indignities, threats, annoyances, or petty oppressions, or other trivialities". Restatement § 46 cmt. d; *see also Grimsby v. Samson*, 85 Wash.2d 52, 530 P.2d 291, 295 (1975). Enlisting the men's help in deceiving the union may be objectionable, but it was not "beyond all possible bounds of decency and utterly intolerable in a civilized society." Restatement § 46 cmt. d.

Nor did these plaintiffs show that they suffered severe or extreme emotional distress, with objectively manifested symptoms. *Hansley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096, 1103 (1976). More than the stress of everyday life must be shown. *Id.*; *see also Spurrell*, 701 P.2d at 535-36 (one sleepless night, tears, loss of appetite and anxiety is not severe emotional distress); *Lawson v. Boeing Co.*, 58 Wash.App. 261, 792 P.2d 545, 550-51 (1990) (loss of appetite, libido and energy, sleeplessness and increased headaches did not satisfy severe emotional distress element), *review denied*, 116 Wash.2d 1021, 811 P.2d 219

(1991). The court did not find any objectively manifested symptoms and the seafarers failed to allege them.

C. Blacklisting

The seamen say that by recording the reason for discharge in their seamen's books, the shipowners violated the prohibition against blacklisting.

Few courts have considered blacklisting claims. The Restatement explains blacklisting as

> intentionally and improperly interfer[ing] with another's prospective contractual relation- . . . whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Restatement § 766B. If the statement is true, however, it is not improper:

> One who intentionally causes a third person . . . not to enter into a prospective contractual relation with another does not interfere improperly . . . by giving the third person
>
> (a) truthful information, or
>
> (b) honest advice within the scope of a request for the advice.

Id. § 772; *see also id.* cmts. a, b.

The seamen do not dispute that the entries were accurate and true and their claim of blacklisting fails.

IV

Ordinarily, the prevailing party in a maritime action is not entitled to attorneys' fees. Under the courts' equitable powers, however, a court may award fees when the defendant has forced the plaintiff to "go to court to get what was plainly owed him". *Vaughan v. Atkinson*, 369 U.S. 527, 531, 82 S.Ct. 997, 999, 8 L.Ed.2d 88 (1962).

The PINE FORST court awarded $564,737 in attorneys' fees, apportioned thus: $410,043 for the seamen discharged in the United States and $154,693 for those discharged overseas. We affirm that portion of the judgment awarding fees to the men discharged here and reverse the award to those discharged overseas.

The shipowners contend that they should not be required to pay any such fees, for they tendered the amount due shortly after the men left the ship. Yet they also pressed counterclaims for back wages paid, for the costs of what they thought was an excessive bond and for the costs of defending the action in the United States. We agree with the district court that the men discharged here had no choice but to seek the help of the court to retain the wages to which they were plainly entitled.

V

The judgment of dismissal in the SOUTHERN ASTER case is affirmed, as is the judgment denying intervention to the FIR GROVE seafarers. The parties will bear their own costs on appeal in both cases.

The PINE FOREST judgment is reversed, except for that portion of the judgment granting attorneys' fees to the men discharged in the United States. The parties will bear their own costs.

Nelson R. RABY, et al.,
Plaintiffs-Appellees,

v.

M/V PINE FOREST, In Rem, Delica Shipping, S.A., and Inui Steamship Co., Ltd., Defendants-Appellants.

No. 90-35618.

United States Court of Appeals,
Ninth Circuit.

Submitted August 31, 1990.

Decided Oct. 29, 1990.

Paul N. Wonacott and Kathleen A. McKeon, Wood, Tatum, Moser, Brooke & Landis, Portland, Or., for defendants-appellants.

Richard J. Dodson, Baton Rouge, La., for plaintiffs-appellees.

Appeal from the United States District Court for the Western District of Washington.

Before WALLACE, THOMPSON and FERNANDEZ, Circuit Judges.

FERNANDEZ, Circuit Judge:

After a bench trial, the district court found in favor of the plaintiffs and fixed damages in the sum of $32,657,006. Since defendants sought to appeal and wished to stay execution, the district court then set the supersedeas bond at $59,000,000. Of that, $19,613,565 represented penalty wages which would accrue at the rate of $26,152 per day while the case was on appeal. 46 U.S.C. § 10313(g). Interest on the accruing portion was also

included. Defendants have asked that we reduce the amount of the bond.

We review the decision of the district court setting the amount of the bond for abuse of discretion. *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1505 n. 1 (9th Cir.1987).

Here we find an abuse of discretion because the district court erred when it failed to allow for the payment of the back wages into court, an event that would stop the running of penalties. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 n. 9, 102 S.Ct. 3245, 3252 n. 9, 73 L.Ed.2d 973 (1982); *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81, 87-88 n. 26 (3rd Cir.1966); *Southern Cross Steamship Co. v. Firipis*, 285 F.2d 651, 659-60 (4th Cir. 1960), *cert. denied*, 365 U.S. 869, 81 S.Ct. 903, 5 L.Ed.2d 859 (1961). That option ought to be available to defendants.

Our review of the district court's decision in this case suggests the possibility that the defendants have already tendered all or a part of the back wages, but the decision is far from clear in that respect. If all of the back wages owed to a particular plaintiff have been tendered, the penalty wages will have ceased to accrue as to that plaintiff's claim. We emphasize that penalty wages found to have accrued up to the date of tender of back wages need not themselves be tendered in order to preclude the accrual of further penalties.

We are aware that, under some circumstances, an appeal from a wage award may itself stop the accrual of penalties if the appeal is taken on strong and reasonable grounds. *Pacific Mail S.S. Co. v. Schmidt*, 241 U.S. 245, 250-51, 36 S.Ct. 581, 582-83, 60 L.Ed. 982 (1916). *See also*

Southern Cross Steamship Co. v. Firipis, 285 F.2d 659. However, in those cases the courts were able to comment upon the strength of the appeal after having the benefit of full briefing on the merits, and did so at the time of deciding the cases on the merits. The courts were not attempting to divine the strengths of the appeal before them in advance for the purpose of setting a supersedeas bond. Given the posture of this case and the complexity of the issues, we are unable to decide the merits of the wage claims at this early stage of the proceedings, and we are unwilling to speculate on the outcome of the appeal.

Based upon the above, we reverse the district court's order fixing the amount of the supersedeas bond insofar as it is based upon the projected accrual of penalty wages, and we remand to that court for the limited purpose of re-setting the bond. In so doing, the district court shall determine whether the full amount of back wages (not including penalty wages or interest) has been tendered to the plaintiffs, or to any of them. If so, penalty wages shall be deemed to have ceased to accrue for the affected plaintiffs as of the date of tender. If not, the penalties may be deemed to continue accruing until the back wages are tendered. As we have already stated tender includes payment into court.[1] The bond required of the defendants shall be reduced accordingly.

The stay of execution previously ordered by us shall remain in full force and effect without the further posting of bond until such time as the district court has entered

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[1] We hasten to add that nothing in this opinion is intended to suggest that all or any portion of the penalty wages, or back wages, should have been assessed against the defendants.

its order setting the bond in a manner not inconsistent with this opinion.

REVERSED as to the bond, and REMANDED for the limited purpose of setting a new bond.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NELSON R. RABY, et al., Plaintiff, -vs- M/V PINE FOREST, *In rem*, DELICA SHIPPING, S.A.; and INUI STEAMSHIP CO., LTD. Defendant.	NO. C90-5038T FINDINGS OF FACT CONCLUSIONS OF LAW AND JUDGMENT

THIS MATTER having come on for trial before the above-named court sitting without a jury, and plaintiffs being represented by counsel, and defendants being represented by counsel, and plaintiffs having produced evidence in support of their claims, and defendants having also produced evidence in this matter, and the court having heard and considered the argument of counsel, and the court being fully advised in this matter, now makes the following:

FINDINGS OF FACT

1. The plaintiffs are thirteen Filipino seafarers represented by individual counsel, and eight Filipino seamen represented by AMOSUP, (Associated Marine Officers and Seamen's Union of the Philippines). AMOSUP is authorized to assert its members' statutory wage claims. AMOSUP makes no claim of its own. All 21 seamen were employed to serve as seamen on board the M/V Pine

Forest, (defendant *in rem*) a vessel owned by defendant Delica Shipping, S.A., a Panamanian corporation, and flying the flag of the Republic of Vanuatu. The manager and operator of the vessel is defendant Inui Steamship Co., Ltd., a Japanese shipping company.

2. Plaintiffs Raby, Alvardo and Berido were the only plaintiffs who personally actually testified at the time of trial. The other ten plaintiffs did not personally appear in court. Their failure to personally appear does not appear to be of their own doing. The court therefore finds that they were "unavailable" for trial. In these circumstances the depositions of the absent plaintiffs are admissible under Rule 32 of the Federal Rules of Civil Procedure and Rule 804(B) of the Federal Rules of Evidence.

3. None of AMOSUP plaintiffs appeared at the time of trial. All eight (8) of AMOSUP plaintiffs were or are still in defendants' employ. These plaintiffs were, at all time relevant herein, under defendants' dominion and control.

4. The Philippine plaintiffs were recruited in Manila by Western Shipping Agency, a Philippine corporation and manning agent for defendants, Delica and Inui. The plaintiffs were being recruited for the first voyage of the M/V Pine Forest.

5. Each plaintiff signed an individual employment contract agreeing serve on board the M/V Pine Forest. The contracts were signed in blank by plaintiffs at the Western Shipping Office in Manila. There were no figures inserted therein for each plaintiffs' wages and, instead, the plaintiffs were told generally what the wage rates would be.

6. Each plaintiff joined the M/V Pine Forest in Japan on March 27, 1989, with the exception of plaintiffs Raby and Galua, who joined the vessel on July 22, 1989 and January 8, 1990 respectively. At that time, each plaintiff signed shipping articles on board the vessel that were in the substance and form prescribed by the Republic of Vanuatu. The shipping articles incorporated the Worldwide International Transport-Worker's Federation Collective Agreement and contained a significantly higher pay scale than the oral representations made to plaintiffs by Western Shipping Agency in Manila. The shipping articles set forth the base monthly wage next to each seafarers name and signature.

7. On September 14, 1989, unknown to plaintiffs, the shipowner through its agent, Western Shipping Co., Ltd. in Manila, entered into a joint JSU/AMOSUP Collective Bargaining Agreement. Defendants recognized AMOSUP as the exclusive collective bargaining representative of all the Filipino seamen aboard the M/V Pine Forest. The AMOSUP Collective Bargaining Agreement contained significantly lower wages than those contained in the shipping articles and ITF Collective Bargaining Agreement executed by the plaintiffs when they boarded the M/V Pine Forest.

8. The defendants executed the JSU/AMOSUP agreement for the sole purpose of obtaining an ITF blue certificate and to enroll the M/V Pine Forest with the ITF. At all times relevant hereto, defendants never obtained the "blue certificate." Thereafter, the Pine Forest traded exclusively between Japan and the Northwest coast of the United States.

9. From the date the plaintiffs joined the M/V Pine Forest until the vessel was arrested in Tacoma, Washington, on January 31, 1990, the vessel was called on United States ports a total of eight times, arriving on the following dates in 1989: April 9th, May 17th, June 22nd, August 1st, September 17th, October 26th, December 8th, and January 24, 1990. All of these voyages were between the United States and Japan.

10. The M/V Pine Forest carried logs and wood products from the Pacific Northwest to Japan. Upon returning to United States waters, it would discharge ballast and take on cargo. This court finds that ballast discharged is "cargo" as that term is used in 46 U.S.C. Section 10313(f). One hundred percent of the income of the M/V Pine Forest since its launching was earned from these voyages carrying wood products from the United States to Japan and back.

11. The plaintiffs were paid on a monthly basis. Each month the plaintiffs executed a pay voucher or "wage receipt" wherein each plaintiff certified he received the wages and benefits called for in the shipping articles and the ITF Collective Bargaining Agreement incorporated therein. Plaintiff never received the wages specified in the Shipping Articles.

12. The shipowner also required the plaintiffs to sign a separate receipt for wages actually paid by the master and received by each plaintiff. This practice is referred to by defendants as the keeping of "double books." At least one instance of double-bookkeeping occurred in the United States while the vessel was in Longview, Washington.

13. Defendants admit that they never intended to comply with the shipping articles and ITF wage scale. The conduct of defendants in the practice of double-bookkeeping and in its refusal to pay plaintiffs their rightful wages was fraudulent, intentional, and in bad faith. The seamen were in a very vulnerable position and were easily intimidated.

14. Plaintiffs signed receipts for the wages specified in the shipping articles while in the United States waters only once, but defendants knew that all of the monthly wage receipts stipulating the higher wages were on board the M/V Pine Forest each time plaintiffs wages were wrongfully withheld at the end of eight separate voyages to United States waters.

15. In these circumstances, plaintiffs' execution of the shipping articles and their signing the wage receipts for the wages set forth in the shipping articles constituted a legally sufficient demand for payment of wages.

16. Plaintiffs' demand for wages and for the defendants' illegal withholding of wages occurred while both plaintiffs and the M/V Pine Forest were in the U.S. Harbors or waters at the end of eight separate voyages from Japan to the United States.

17. The defendants' fraudulent actions requiring plaintiffs to sign two sets of conflicting wage receipts was a repudiation of their contractual obligation to pay plaintiffs the wages specified in the shipping articles, and discharged, by operation of law, plaintiffs duty to make formal demand for wages.

18. Application of 46 U.S.C. Section 10313(e) was triggered when plaintiffs' demand for payment of half wages earned and unpaid at each port at which the vessel discharged ballast was refused. Application of 46 U.S.C. Section 10313(f) was triggered when, at the end of a voyage, plaintiffs were not paid the balance of wages owing.

19. On January 31, 1989, the M/V Pine Forest was arrested in Tacoma, Washington. All plaintiffs except Silverio and Cabiltan were aboard the vessel. Plaintiffs were claiming back due wages in accordance with the ITF shipping articles they had executed and which were their contract of employment.

20. On February 13, 1990, the total sum of $267,585.65 was tendered by defendants to the original thirteen plaintiffs for wages claimed through January 24, 1990, but the tender did not include penalty wages. The amount tendered did not include $15,019.20 in wages earned by the seamen between January 24th and February 8th, the date of final discharge which amount was claimed in plaintiffs' amended complaints for back wages. Payments were made without admission of liability and with reservations of right to collect same if court found in favor of defendants. Penalty wages are included in the definition of wages. Defendants have failed to show sufficient cause for withholding payment of penalty wages once back due wages were paid in February of 1990.

21. At the time the thirteen original plaintiffs signed off the M/V Pine Forest in Tacoma, Washington, defendants directed the captain to make a notation in each

plaintiffs' Seamen's Book in the column entitled "Reason for Discharge:" "Requested repatriation upon filing wage claim to arrest vessel."

22. These notations in the plaintiffs' Seamen's Books rendered them unemployable in the Philippines as merchant seamen and they have been effectively "black-listed" from obtaining future employment on ocean-going vessels.

23. It was the intent of the defendants, when the notations were made, to punish the plaintiffs for having made a claim for their wages by entering the above-notations and making them unemployable as merchant seamen.

24. After the repatriation of the thirteen original plaintiffs to the Republic of the Philippines, none of them were able to find employment as seamen because of the notations made in each plaintiffs' Seamen's Books. At least four of the plaintiffs were personally refused employment.

25. The plaintiffs are not able to obtain new Seamen's Books because of the applicable regulations of the Philippine Coast Guard and will not be able to do so in the future.

26. Any overtime worked by plaintiffs never appeared in the ship's log.

27. Defendants ordered the captain of the M/V Pine Forest to alter the ship's shipping articles. The captain then ordered the chief engineer to actually alter the articles.

28. All of the other defendants' ships have been and are now operated in the same manner as the M/V Pine Forest as to the payment of seamen's wages and double bookkeeping.

29. Before the M/V Pine Forest left Tacoma, after the arrest, six of the AMOSUP plaintiffs executed documents entitled "Voluntary Dismissals" prepared by defense counsel with plaintiffs' signatures procured by the master of the vessel. The court finds that these documents were executed by plaintiffs under conditions of intimidation and coercion, and, therefore, they have no legal effect.

30. The court finds that each trip of the M/V Pine Forest from Japan to the United States was a "voyage" as that term is used in 46 U.S.C. Section 10313.

31. This court finds that the conduct by defendants at all times relevant herein was intentional, deliberate, reckless, callous, flagrant, malicious, indifferent, and unconscionable. That such conduct by the defendants was to intimidate, coerce and punish the plaintiffs. That such conduct was in complete disregard of the plaintiffs' rights. That defendants' conduct at all times relevant herein, violates the laws and public policy of the United States. The plaintiffs herein are entitled under statute and general maritime law of the United States to the protection of the courts.

32. The facts and circumstances in this case have convinced this court that plaintiffs are entitled to punitive damages in such an amount as will punish the defendants to stop their past, continuing and ongoing tortious conduct in operation of the M/V Pine Forest and those other

ships that they operate that sail into any port in the United States. That the awarding of punitive damages against the defendants will serve to punish defendants for their conduct and to deter others from following defendants' example.

33. The thirteen (13) Original Plaintiffs are entitled to back pay including penalty wages as follows:

13 ORIGINAL PLAINTIFFS	BACK WAGES	PENALTIES (as of 5/21/90)
Camilo Alvarado	$ 7,235.88	$ 597,706.96
Nelson Raby	2,894.19	205,187.25
Teofaniz Roz	1,555.95	480,685.44
Apolonio Torreliza	1,621.29	480,685.44
Leo Ajero	1,762.72	463,426.56
Teodoro Rabie	2,894.19	280,613.44
Modesto Berido	875.91	280,613.44
Marcelo Suarez	875.91	280,613.44
Miguelto Cabales	1,240.61	280,613.44
Teodoro Marquez	548.26	210,381.76
Leonardo Bonnit	626.19	210,381.76
Hermenigildo Banogon	938.79	210,381.76
Cervasito P. Laxina	626.19	210,381.76

34. The eight (8) AMOSUP plaintiffs are entitled to back wages and penalties as follows:

S. Galua	$ 2,686.90	$ 26.329.68
Bonifacio Tabada	9,551.57	480,685.44
Can Machete	29,175.90	463,462.56

Francisco Yabo	$ 18,096.49	$ 311,428.80
Guelberto Bete	16,065.54	280,613.44
G. Villaruel	16,065.54	280,613.44
Russel Silrerio	20,044.20	391,924.43
Mario Cabiltan	30,549.91	564,404.72

35. The thirteen (13) Original Plaintiffs are entitled to compensatory damages which includes loss of future income and mental distress, as follows:

13 ORIGINAL PLAINTIFFS:	LOSS OF FUTURE INCOME	EMOTIONAL DISTRESS
Camilo Alvarado	$ 950,586.00	$ 100,000.00
Nelson Raby	892,534.00	100,000.00
Teofaniz Roz	649,665.00	100,000.00
Apolonio Torreliza	554,737.00	100,000.00
Leo Ajero	676,302.00	100,000.00
Teodoro Rabie	379,260.00	100,000.00
Modesto Berido	390,009.00	100,000.00
Marcelo Suarez	464,441.00	100,000.00
Miguelito Cabales	480,301.00	100,000.00
Teodoro Marquez	360,091.00	100,000.00
Leonardo Bonnit	353,874.00	100,000.00
Hermenigildo Banogon	341,649.00	100,000.00
Guelberto P. Laxina	307,021.00	100,000.00

36. The eight (8) AMOSUP plaintiffs are entitled to compensatory damages for mental distress as follows:

AMOSUP PLAINTIFFS:	LOSS OF FUTURE INCOME	EMOTIONAL DISTRESS
S. Galua	NONE	$ 50,000.00
Bonifacio Tabada	NONE	50,000.00
Can Machete	NONE	50,000.00
Francisco Yabo	NONE	50,000.00
Guelberto Bete	NONE	50,000.00
G. Villaruel	NONE	50,000.00
Russel Silrerio	NONE	50,000.00
Mario Cabiltan	NONE	50,000.00

37. All plaintiffs are entitled to punitive damages as follows:

13 ORIGINAL PLAINTIFFS:	PUNITIVE DAMAGES
Camilo Alvarado	$ 1,000,000.00
Nelson Raby	1,000,000.00
Teofaniz Roz	1,000,000.00
Apolonio Torreliza	1,000,000.00
Leo Ajero	1,000,000.00
Teodoro Rabie	1,000,000.00
Modesto Berido	1,000,000.00
Marcelo Suarez	1,000,000.00
Miguelito Cabales	1,000,000.00
Teodoro Marquez	1,000,000.00
Leonardo Bonnit	1,000,000.00
Hermenigildo Banogon	1,000,000.00
Cervasito P. Laxina	1,000,000.00
AMOSUP PLAINTIFFS:	
S. Galua	500,000.00
Bonifacio Tabada	500,000.00
Can Machete	500,000.00
Francisco Yabo	500,000.00
Guelberto Bete	500,000.00

G. Villaruel	$ 500,000.00
Russel Silrerio	500,000.00
Mario Cabiltan	500,000.00

38. The plaintiffs, as the prevailing party herein, are entitled to be awarded reasonable attorneys' fees, and interest.

The court finds the foregoing Findings of Fact to have been shown by a preponderance of the evidence in this matter.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

All Findings of Fact more appropriately termed Conclusions of Law will be incorporated as such.

1. This court has jurisdiction of this matter under the United States Constitution Article III pursuant to federal Admiralty and Maritime jurisdiction; 28 U.S.C. Section 1333; and pursuant to 46 U.S.C. Section 10313(i) of the Shipping Code.

2. That defendant vessel and plaintiffs were located in Tacoma, Pierce County, Washington at the time of the filing of the complaint herein.

3. Federal law rather than State of Washington law controls damage issues when the cause of action arises under Federal Maritime Law.

4. All of plaintiffs' claims for back wages, including penalty wages, compensatory damages for tort, and punitive damages are properly before this court. Defendants'

intentional, fraudulent, bad faith conduct is a maritime tort resulting in a maritime lien for compensatory and punitive damages.

5. The tolling of the statute of limitations does not occur until back due wages and penalties have been paid in full.

6. The seamen are entitled to two days' wages for each day payment was withheld from the date of each wrongful withholding until full wages and penalties wages are paid. Penalty wages will continue to accrue at two times each plaintiff's rate of pay until the actual payment is received. Those plaintiffs hereinafter mentioned are awarded as back pay including penalties the following sums of money:

13 ORIGINAL PLAINTIFFS	BACK WAGES	PENALTIES
Camilo Alvarado	$ 7,235.88	$ 597,706.96
Nelson Raby	2,894.19	205,187.25
Teofaniz Roz	1,555.95	480,685.44
Apolonio Torreliza	1,621.29	480,685.44
Leo Ajero	1,762.72	463,426.56
Teodoro Rabie	2,894.19	280,613.44
Modesto Berido	875.91	280,613.44
Marcelo Suarez	875.91	280,613.44
Miguelto Cabales	1,240.61	280,613.44
Teodoro Marquez	548.26	210,381.76
Leonardo Bonnit	626.19	210,381.76
Hermenigildo Banogon	938.79	210,381.76

Cervasito P. Laxina	$ 626.19	$ 210,381.76
AMOSUP PLAINTIFFS:		
S. Galua	2,686.90	26,329.68
Bonifacio Tabada	9,551.57	480,685.44
Can Machete	29,175.90	463,462.56
Francisco Yabo	18,096.49	311,428.80
Guelberto Bete	16,065.54	280,613.44
G. Villaruel	16,065.54	280,613.44
Russel Silrerio	20,044.20	391,924.43
Mario Cabiltan	30,549.91	564,404.72

7. Those plaintiffs hereinafter mentioned are awarded as compensatory damages for the outrageous, malicious and intentional conduct of the defendants, especially, but not limited to, the entry of the notations in the thirteen Seamen's Books. The making of the notations made the thirteen Seamen unemployable. That such conduct of the defendants was for retaliation and punishment of the plaintiffs for requesting what they were lawfully entitled to, their wages. Defendants' conduct at all times relevant herein, caused plaintiffs duress, emotional distress, and prevented them from being employable as seamen.

13 ORIGINAL PLAINTIFFS:	**LOSS OF FUTURE INCOME**	**EMOTIONAL DISTRESS**
Camilo Alvarado	$ 950,586.00	$ 100,000.00
Nelson Raby	892,534.00	100,000.00
Teofaniz Roz	649,665.00	100,000.00
Apolonio Torreliza	554,737.00	100,000.00

Leo Ajero	$ 676,302.00	$ 100,000.00
Teodoro Rabie	379,260.00	100,000.00
Modesto Berido	390,009.00	100,000.00
Marcelo Suarez	464,441.00	100,000.00
Miguelito Cabales	480,301.00	100,000.00
Teodoro Marquez	360,091.00	100,000.00
Leonardo Bonnit	353,874.00	100,000.00
Hermenigildo Banogon	341,649.00	100,000.00
Guelberto P. Laxina	307,021.00	100,000.00

AMOSUP PLAINTIFFS:	LOSS OF FUTURE INCOME	EMOTIONAL DISTRESS
S. Galua	NONE	$ 50,000.00
Bonifacio Tabada	NONE	50,000.00
Can Machete	NONE	50,000.00
Francisco Yabo	NONE	50,000.00
Guelberto Bete	NONE	50,000.00
G. Villaruel	NONE	50,000.00
Russel Silrerio	NONE	50,000.00
Mario Cabiltan	NONE	50,000.00

8. That plaintiffs hereinafter mentioned are awarded punitive damages under general maritime law because of the callous, deliberate, unconscionable, reckless, indifferent, intentional, flagrant, fraudulent, unlawful and malicious conduct of defendants' agents at all times relevant herein. The evidence is clear and convincing and beyond a preponderance of the evidence that defendants' agents were at all times acting within the scope of their employment and were acting for and at the direction of the defendants.

13 ORIGINAL PLAINTIFFS:	PUNITIVE DAMAGES
Camilo Alvarado	$ 1,000,000.00
Nelson Raby	1,000,000.00
Teofaniz Roz	1,000,000.00
Apolonio Torreliza	1,000,000.00
Leo Ajero	1,000,000.00
Teodoro Rabie	1,000,000.00
Modesto Berido	1,000,000.00
Marcelo Suarez	1,000,000.00
Miguelito Cabales	1,000,000.00
Teodoro Marquez	1,000,000.00
Leonardo Bonnit	1,000,000.00
Hermenigildo Banogon	1,000,000.00
Cervasito P. Laxina	1,000,000.00

AMOSUP PLAINTIFFS:	PUNITIVE DAMAGES
S. Galua	500,000.00
Bonifacio Tabada	500,000.00
Can Machete	500,000.00
Francisco Yabo	500,000.00
Guelberto Bete	500,000.00
G. Villaruel	500,000.00
Russel Silrerio	500,000.00
Mario Cabiltan	500,000.00

9. Defendants are entitled to an offset in the amount of $267,585.65.

10. Any and all documents signed by plaintiffs herein after the arrest of the vessel are null and void and have no legal effect. Plaintiffs have shown good cause pursuant to 46 U.S.C. Section 10313(e), and the Voluntary Dismissals are hereby set aside.

11. In accordance with 46 U.S.C. 10313, prejudgment interest is awarded to the plaintiffs on the award of

back wages and on penalty wages, on the date when the wages first came due, i.e., when the ship entered United States waters. Interest shall begin to run on the compensatory and punitive damages as of the date of entry of judgment herein.

13. Interest is awarded and shall accrue in accordance with 28 U.S.C. Section 1961. Judgment is entered against the defendants, the M/V Pine Forest *in rem* and Delica Shipping, S.A. and Inui Steamship Co. Ltd., jointly and severally *in personam* for plaintiffs' compensatory and punitive damages, back wages, penalty wages, and for reasonable attorneys' fees, interest and costs.

14. Plaintiffs as the prevailing party herein shall be awarded reasonable attorneys' fees in an amount to be determined at a later date. Award of attorneys' fees is predicated on defendants' bad faith and is proper under *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 88 (1962).

15. The plaintiffs shall recover their costs and expenses in such sums as are determined by the clerk of the court.

16. Judgment is further entered for additional penalty wages which shall continue to accrue for each plaintiff seaman from May 21, 1990, at two (2) times each plaintiff's daily rate of pay until actual receipt of payment. The exact amount of these additional penalty wages shall be computed at the time of payment.

DATED this 6th day of AUGUST 1990.

/s/ Josh E. Tanner
UNITED STATES DISTRICT
JUDGE

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

I. HYEON SU; JO SEONG GU, et al.; GIM YEONG HO; PARK MIN HO, et al.; BARG YEONG PAL; SEO JEOM TAE; LEE SIL GWANG; JUNG JU GOANG; JI JE JE; O HAN SEON; SON CHI IL; CHOI WEON IL; CHU CHAE SOK; KIG OG NAM; HAN BAG KIL; PYEON YUN SU; PARK SUNG OK; KA CHAE HO; FEDERATED KOREAN SEAMEN'S UNION, et al.,

Plaintiffs-Appellants,

v.

M/V SOUTHERN ASTER; SOUTHERN ASTER NAVIGATION, S.A.,

Defendants-Appellees.

Nos. 90-35485
90-35486

D.C. No.
CV-90-165-MA

NELSON R. RABY; TEOFANIS F. ROZ; APOLONIO H. TORRELIZA; ASSOCIATED MARINE OFFICERS & SEAMAN'S UNION OF THE PHILIPPINES; S. GALUA; BOIFACIO C. TABADA, et al; LEO C. AJERO; TEODULO R. RABIE; MARCELO G. SUAREZ; MIGUELITO A. CABALES, et al.,

Plaintiffs-Appellees,

v.

M/V PINE FOREST; DELICA SHIPPING, S.A.; INUI STEAMSHIP CO., LTD.,

Defendants-Appellants.

Nos. 90-35618
90-35879
91-35375

D.C. No.
CV-90-5038-JET

ORDER
(Filed
Dec. 9, 1992)

Before: WRIGHT, BEEZER, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judges Beezer and Leavy have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

---

46 U.S.C. § 10313. Wages

(a) A seaman's entitlement to wages and provisions begins when the seaman begins work or when specified in the agreement required by section 10302 of this title for the seaman to begin work or be present on board, whichever is earlier.

(b) Wages are not dependent on the earning of freight by the vessel. When the loss or wreck of the vessel ends the service of a seaman before the end of the period contemplated in the agreement, the seaman is entitled to wages for the period of time actually served. The seaman shall be deemed a destitute seaman under section 11104 of this title. This subsection applies to a fishing or whaling vessel but not a yacht.

(c) When a seaman who has signed an agreement is discharged improperly before the beginning of the voyage or before one month's wages are earned, without the seaman's consent and without the seaman's fault justifying discharge, the seaman is entitled to receive from the master or owner, in addition to wages earned, one month's wages as compensation.

(d) A seaman is not entitled to wages for a period during which the seaman –

> **(1)** unlawfully failed to work when required, after the time fixed by the agreement for the seaman to begin work; or

(2) lawfully was imprisoned for an offense unless a court hearing the case otherwise directs.

(e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days wages for each day payment is delayed.

(h) Subsections (f) and (g) of this section do not apply to a fishing or whaling vessel or a yacht.

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

(Pub.L. 98-89, Aug. 26, 1983, 97 Stat. 566; Pub.L. 99-640, § 10(b)(4), Nov. 10, 1986, 100 Stat. 3550.)

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MAR 4 1993

No. 92-1316

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Supreme Court of the United States

October 1992 Term

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Petitioners,

v.

M/V PINE FOREST, *et al*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit Civil Appeal Nos. 90-35618, 90-35879, 91-35375

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

PAUL S. EDELMAN
KREINDLER & KREINDLER
100 Park Avenue
New York, NY 10017
(212) 687-8181

Attorneys for Amici Curiae,
The Apostleship of the Sea,
National Catholic Conference for Seafarers,
The North American Maritime Ministry Association,
The Seamen's Church Institute of Florida,
New England Seamen's Mission
Beaumont International Seamen's Center
Bay Area Seafarers' Services/International Maritime Center
Seafarer and International House of New York
Seamen's Mission of Chicago
Stella Maris Maritime Center of New Orleans,
New Orleans Baptist Seamen's Center,
Brunswick Port Society d/b/a/
International Seaman's House
Tacoma Seamen's Center, and the
International Transport Workers' Federation

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Apostleship of the Sea, National Catholic Conference for Seafarers, The North American Maritime Ministry Association, the Seamen's Church Institute of Florida, New England Seamen's Mission, Beaumont International Seamen's Center, Bay Area Seafarers' Services/International Maritime Center, Seafarer and International House of New York, Seamen's Mission of Chicago, Stella Maris Maritime Center of New Orleans, New Orleans Baptist

Seamen's Center, Brunswick Port Society d/b/a International Seamen's House, Tacoma Seamen's Center, and the International Transport Workers' Federation respectfully move this Court for leave to file the accompanying amicus curiae brief in support of Nelson R. Raby and the other petitioners pursuant to Supreme Court Rule No. 37 urging this Court to grant the petition for certiorari.

Consent has been withheld by counsel for respondents, requiring the filing of this motion.

The Apostleship of the Sea is the official outreach ministry of the Catholic Church to seafarers and all who work or travel on the High Seas. The Apostleship of the Sea supervises 64 designated port chaplains and hundreds of lay workers of the Catholic Church at 53 ports in the United States of America. The National Catholic Conference for Seafarers is a voluntary association of Catholic seafarers and port ministries acting as an auxiliary to assist the Apostleship of the Sea. The North American Maritime Ministry Association is a voluntary association of port ministries consisting of Catholic, Orthodox and Protestant, including Lutheran, Anglican, Presbyterian, United Methodist, American and Southern Baptist, and many others working together to minister to seafarers of all faiths.

The Seamen's Church Institute of Florida, New England Seamen's Mission, Beaumont International Seamen's Center, Bay Area Seafarers' Services/International Maritime Center, Seafarer and International House of New York, Seamen's Mission of Chicago, Stella Maris Maritime Center of New Orleans, New Orleans Baptist Seamen's

Center, Brunswick Port Society d/b/a International Seamen's House, and the Tacoma Seamen's Center are non-profit, tax exempt entities organized under the laws of various states for the purposes of rendering services to seafarers calling at United States ports. Each of these port ministries is affiliated with a recognized religious group. Each ministry is ecumenical and ministers to seafarers of all faiths and nationalities. There are over 100 port ministries in the United States, of which the above named port ministries are only a few. Each of the port ministries, chaplains, both lay and ordain, visit seafarers on ships, and, when possible, welcome the seafarers to seafarers' clubs where they can relax, telephone home, mail letters, and recover their sense of dignity and community. The great majority of seafarers welcomed to United States ports by port ministries are foreign seamen-less than 3% are United States citizens. Foreign seamen, far away from their homes and family support, frequently request assistance regarding their working conditions and entitlement to wages.

The International Transport Workers' Federation is a labor secretariat based in London, England. Its membership consists of over 450 unions around the world that are engaged in transportation services. Membership of the affiliates comprising the International Transport Workers' Federation is over 4,000,000 individuals. Numerous North American maritime unions are affiliates of the International Transport Workers' Federation, including the National Maritime Union, the Seamen's International Union, the Masters, Mates and Pilots Association, and others.

The Ninth Circuit Court of Appeals has ruled in this litigation that truth is an absolute defense to the maritime tort of blacklisting, regardless of the shipowner's motive or intent and whether or not the truthful statements were made in retaliation for the seaman requesting his wages that were lawfully due.

The decision of the Ninth Circuit Court of Appeals in this litigation significantly impacts the ability of the maritime port ministries to advise seamen about the protection available under the Seaman's Wage Act and the seaman's entitlement to his wages without suffering retaliatory action by the shipowner. The present opinion requires a seaman to forego his right to future employment by being blacklisted with no recourse under the general maritime law. Movers submit that a shipowner should not, as a matter of law, be entitled to intimidate and coerce a seaman by truthfully telling him that he will be blacklisted and never work again if he demands his lawful wages, and then in fact blacklist the seaman with immunity when the seaman does demand his wages.

The International Transport Workers' Federation believes that a review of this matter is necessary because the opinion of the Ninth Circuit Court of Appeals is in direct conflict with the policy underlying the Seaman's Wage Act, and further that the opinion encourages foreign shipowners to circumvent their contractual obligations validly entered into with the seamen, frequently including ITF approved agreements.

The opinion of the Ninth Circuit Court of Appeals prevents the seamen from enjoying the benefits of an ITF

collective bargaining agreement incorporating the shipping articles. Seamen will not demand their wages if they are required to forego future employment as merchant seamen to obtain what is plainly theirs – namely the wages set forth in the shipping articles.

For the foregoing reasons, Amici request that their motion to file the annexed brief amicus curiae be granted.

Dated this 4 day of March, 1993.

Respectfully submitted:

KREINDLER & KREINDLER
100 Park Avenue
New York, NY 10017
(212) 687-8181

By: _____
PAUL S. EDELMAN

Attorneys for Amici Curiae,
The Apostleship of the Sea,
The National Catholic Conference for Seafarers
The North American Maritime Ministry Association
The Seamen's Church Institute of Florida
New England Seamen's Mission
Beaumont International Seamen's Center
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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE..... 2

SUMMARY OF ARGUMENT..... 3

REASONS FOR GRANTING CERTIORARI 4

I. THE PETITION FOR CERTIORARI RAISES SIGNIFICANT NATIONAL ISSUES OF LAW REGARDING THE PROPER INTERPRETATION OF THE SEAMAN'S WAGE ACT 4

II. BLACKLISTING IS A MARITIME TORT AND TRUTH OF STATEMENTS MADE IN RETALIATION IS NOT AN ABSOLUTE DEFENSE 7

CONCLUSION 8

TABLE OF AUTHORITIES CITED

Page

CASES:

Carroll v. Protection Maritime Ins. Co., Ltd., 512 F.2d 4 (1st Cir. 1975) 3, 8

Chung Yong Il v. Overseas Navigation Co., 774 F.2d 1043 (11th Cir. 1983), *cert. denied* 474 U.S. 1177 (1986) 6

Griffin v. Oceanic Contractors, 458 U.S. 564 (1982) ... 3, 4, 6

Ibrandsten Co., Inc. v. Johnson, 343 U.S. 779 (1952) ... 3, 5

McCrea v. United States, 294 U.S. 23 (1935) 6

Pino v. Protection Maritime Ins. Co., Ltd., 599 F.2d 10 (1st Cir. 1979), *cert. denied* 444 U.S. 900 (1979). 3, 4, 8

Smith v. Atlas Off-Shore Boat Service, Inc., 653 F.2d 1057 (5th Cir. 1981) 4, 8

Strathearn S.S. Co. v. Dillon, 252 U.S. 348 (1920) 5

STATUTES:

Restatement, Second of Torts, § 772 7

Seaman's Wage Act, 46 U.S.C. § 10313 ..... 2, 4

MISCELLANEOUS:

Chapman, *Trouble on Board*, pp. 37-73 (Cornell University 1992) 4

Norris, *The Law of Seamen*, Ch. 12, Ch. 17 (4th ed. 1985) 4

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BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICI CURIAE

The interest of Amici, the Apostleship of the Sea, National Catholic Conference for Seafarers, The North American Maritime Ministry Association, the Seamen's Church Institute of Florida, New England Seamen's Mission, Beaumont International Seamen's Center, Bay Area Seafarers' Services/International Maritime Center, Seafarer and International House of New York, Seamen's Mission of Chicago, Stella Maris Maritime Center of New Orleans, New Orleans Baptist Seamen's Center, Brunswick Port Society d/b/a/ International Seamen's House, Tacoma Seamen's Center, and the International

Transport Workers' Federation, is set forth in the preceding motion for leave to file this brief.

STATEMENT OF THE CASE

Defendants, Inui Steamship Co., Ltd., and Delica Shipping, S.A., owners of the M/V Pine Forest, Systematically cheated the Philippine crewmembers out of their wages set forth in the shipping articles. The shipowner required the seamen to sign two sets of wage records each month – one for the lower amount actually received each month and another receipt falsely indicating that the plaintiffs had received the wages provided in the shipping articles.

Plaintiffs, thirteen Filipino seamen, sued for their back wages and penalty wages pursuant to the Seaman's Wage Act, 46 U.S.C. § 10313. The shipowner partially paid the back wages and then signed the seamen off the shipping articles, making notations in each Seaman's Book that rendered plaintiffs unemployable as merchant seamen. The trial court found that defendants made the notations as "retaliation and punishment of the plaintiffs for requesting what they were lawfully entitled to – their wages" and awarded compensatory and punitive damages. The Ninth Circuit Court of Appeals reversed holding that the truthfulness of the notations was an absolute defense to plaintiffs' claims for blacklisting. The Ninth Circuit further reversed the trial court's award of penalties under the Seaman's Wage Act holding that either cargo or a seaman must be discharged in a United States

port and further requiring the completion of a voyage as a condition precedent to a claim for statutory penalties.

Amici respectfully represent that the ruling by the Ninth Circuit is contrary to both the general maritime law and the express provisions and underlying purpose of the Seaman's Wage Act.

SUMMARY OF ARGUMENT

This Court has repeatedly stated that seamen are wards of the court and thus entitled to special protection from abusive employment practices. The Seaman's Wage Act must be liberally construed in favor of seamen to effectuate the remedial purpose of the Act. *Ibrandsten Co., Inc. v. Johnson,* 343 U.S. 779 (1952). Courts interpreting the Act must construe its provisions in such a manner as to compel a recalcitrant employer to promptly and honestly pay a seaman his earned wages. *Ibrandsten Co., Inc. v. Johnson, supra; Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564 (1982). Any decision by a court which fails to interpret the Act in a manner which effectuates its purpose erodes the policies underlying the Act and ignores the previous rulings of this Court.

The policy underlying the Wage Act requires the courts to protect the class of persons which the Act is designed to benefit. The general maritime tort of blacklisting serves the purpose of protecting a seaman who asserts his rights under federal law from retaliation and reprisal by an employer. *See, e.g., Carroll v. Protection Maritime Ins. Co., Ltd.* 512 F.2d 4 (1st Cir. 1975); *Pino v. Protection Maritime Ins. Co., Ltd.,* 599 F.2d 10 (1st Cir.

1979), *cert. denied* 444 U.S. 900 (1979); *Smith v. Atlas Offshore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981). The Ninth Circuit relied exclusively upon the Restatement, Second of Torts to conclude that truth was an absolute defense to the tort of blacklisting. The decision of the Ninth Circuit thus undermines the policy of the Seaman's Wage Act and effectively prevents a seaman from enforcing his rights under federal law.

REASONS FOR GRANTING CERTIORARI

I. THE PETITION FOR CERTIORARI RAISES SIGNIFICANT NATIONAL ISSUES OF LAW REGARDING THE PROPER INTERPRETATION OF THE SEAMAN'S WAGE ACT

The maritime industry has long been tarnished by a history of abusive employment practices.[1] In response to deceptive practices concerning the payment of seamen's wages, Congress first enacted the Seaman's Wage Act in 1790. This legislation was clearly remedial in nature, and intended to improve the lot of seafarers worldwide. In 1983 Congress again revisited this problem area and reenacted the Act without intending any substantive changes to the protections afforded under federal law.

The Seaman's Wage Act 46 U.S.C. § 10313 seeks to establish a uniform framework for the regulation of employment conditions for seafarers. Whenever a foreign vessel is within the harbors of the United States, the Act

[1] See Norris, *The Law of Seamen*, Ch. 12, Ch. 17 (4th ed. 1985); Chapman, *Trouble on Board*, pp. 37-73 (Cornell University 1992).

specifically regulates the employer-employee relationship which exists between foreign shipowners and foreign seamen. *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920). The entry of a foreign vessel into United States territorial waters mandates the application of the Wage Act, and therefore, requires the shipowner to conform its conduct regarding payment of the crew with the provisions of the Act.

The case before this Court represents a purposeful attempt by a foreign shipowner to circumvent the application of United States law, namely the Seaman's Wage Act. As discussed more fully in the petition for certiorari, the defendants systematically engaged in a scheme to underpay the seamen by maintaining two sets of wage records. One set of wage records reflecting the wages actually paid to the seamen, and the second set of records falsely indicating that the seamen were being paid the wages mandated under their contracts of employment.

This Court has long held that the Wage Act must be broadly and liberally interpreted in favor of the seaman. *Ibrandsten Co., Inc. v. Johnson*, 343 U.S. 779 (1951). The essential elements for application of the protections of the Wage Act were last discussed by this Court in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982). In *Griffin* this Court noted that the lower courts were divided in their interpretation of the Act, and that many had failed in their duty to faithfully interpret the Wage Act consistent with its intended remedial purpose. The opinion of the Ninth Circuit significantly undermines the protections afforded foreign seamen under the Wage Act, and thus is completely contrary to the previous decision of this Court in *Griffin*.

The opinion of the Ninth Circuit adds several new conditions for the application of the Wage Act. The decision below adds the requirement that cargo be discharged in the United States prior to invoking the Act's protections. In addition, the Ninth Circuit's decision would require the completion of a voyage as a condition precedent to a claim for statutory penalties. In *Griffin v. Oceanic Contractors, Inc., supra,* this Court stated that only two conditions must be satisfied for an award of double wages. This Court held that first a master or owner must have failed to pay the seaman within the time allowed under the Act, and, secondly that this failure must be without sufficient cause. The Ninth Circuit's decision is thus in conflict with the previous decision of this Court in *Griffin* and that of the Eleventh Circuit which do not interpret the Act as having a voyage requirement. *See, Chung Yong Il v. Overseas Navigation Co.,* 774 F.2d 1043 (11th Cir. 1983), *cert. denied* 474 U.S. 1177 (1986) (White, J., dissenting from denial of certiorari).

The previous decisions of this Court provided a seaman with a simple, definite and reasonable procedure by which he might recover double pay where his wages are unreasonably withheld. *See McCrea v. United States,* 294 U.S. 23 (1935). The simple procedure envisioned by the Wage Act is now greatly undermined. The Ninth Circuit has added the requirement that there be a discharge of cargo and the completion of a seaman's employment obligation to the shipowner. No such conditions were required by this Court in *Griffin v. Oceanic Contractors, Inc., supra.* The Ninth Circuit clearly erred by so holding in this case.

II. BLACKLISTING IS A MARITIME TORT AND TRUTH OF STATEMENTS MADE IN RETALIATION IS NOT AN ABSOLUTE DEFENSE.

To achieve the remedial purpose of the Wage Act, a seaman must be free to actively pursue his claim without fear of retaliation or reprisal from his recalcitrant employer. Immediately following the institution of this claim for wages, the defendants herein took steps designed to 'blacklist' all of the plaintiffs-seamen. Through the use of notations in each plaintiff's seaman's book, the defendants began the process of insuring that all of the plaintiffs would be prevented from future employment as merchant seamen.

The employment process for Filipino seamen requires the applicant to submit his seaman's book to the prospective employer so that employer can review any notations made in the book. In this case, the notations in each plaintiff's books as well as other such similar efforts by the defendants, effectively prevented their employment as merchant seamen. The Ninth Circuit reversed the trial court's award of damages for the plaintiffs' loss of future income based upon its conclusion that truth was an absolute defense to the tort of blacklisting. The opinion relied exclusively upon the Restatement, Second of Torts, § 772, for support of this conclusion.

This blind reliance on the Restatement as the exclusive authority concerning the tort of blacklisting in admiralty cases is not supported by prior admiralty jurisprudence. The opinion of the Ninth Circuit fails to consider the effect of the truth defense on the ability of a

seaman to assert a claim for wages under the Wage Act. The remedial purpose of the Wage Act is completely destroyed by a rule of law which allows a member of a protected class to be punished for merely asserting his rights under federal law.

It is evidence that no seaman will seek the protections of the Wage Act if he must therefore sacrifice his future employment in the merchant marine. The protections provided by the maritime law certainly include the right to be free from retaliation and reprisal from a dishonest employer following the seaman's invocation of federal statutory rights. *See, e.g., Carroll v. Protection Maritime Ins. Co., Ltd.*, 512 F.2d 4 (1st Cir. 1975); *Pino v. Protection Maritime Ins. Co., Ltd.*, 599 F.2d 10 (1st Cir. 1979), *cert. denied* 444 U.S. 900 (1979); *Smith v. Atlas Offshore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981). The Ninth Circuit's opinion is thus completely contrary to the decisions of both the First and Fifth Circuit, and represents an intolerable erosion of the protections of the Wage Act itself.

CONCLUSION

Accordingly, for the foregoing reasons, the Amici Curiae respectfully submit that the Petition for Certiorari should be granted, that briefing on the merits should be

ordered and that the matter should be thereafter set for argument to the Court.

Dated this 4 day of March, 1993.

Respectfully submitted:

KREINDLER & KREINDLER
100 Park Avenue
New York, NY 10017
(212) 687-8181

By: Paul S. Edelman

Attorneys for Amici Curiae,
The Apostleship of the Sea,
The National Catholic Conference for Seafarers
The North American Maritime Ministry Association,
The Seamen's Church Institute of Florida,
New England Seamen's Mission
Beaumont International Seamen's Center
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RESPONDENTS' OBJECTION TO MOTION OF PORT MINISTRIES AND THE INTERNATIONAL TRANSPORT WORKERS' FEDERATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT I. SANDERS
WOOD TATUM WONACOTT
& LANDIS
1001 S.W. Fifth Avenue
Suite 1300
Portland, Oregon 97204
(503) 224-5430

Counsel of Record.

WILLIAM R. BISHIN
1111 Third Avenue
Suite 1865
Seattle, Washington 98101
(206) 682-1584

Attorneys for Respondents.

March 18, 1993

Washington, D.C. • THIEL PRESS • (202) 328-3288

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Respondents object to the filing of an amicus brief by the International Transport Workers' Federation ("ITF") and various port ministries in support of plaintiffs' petition for certiorari for the following reasons.

1. The putative *amici curiae* have the same interest as, and are already represented *de facto* by, the plaintiffs in this action.

2. The motion recites no matter – factual or legal – that has not already been brought to the attention of the Court by the petitioners.

3. The tactical, manipulative and deceptive nature of movants' papers disqualify them to act as friends of the Court.

I.
AMICI'S INTERESTS ARE ALREADY REPRESENTED

Neither *amici* nor their counsel requested respondents' consent to the filing of a brief supporting the petition for certiorari. The only request came from Richard J. Dodson, counsel of record for petitioners, who contacted Robert I. Sanders, lead counsel for respondents. Mr. Dodson was thus acting in a representative capacity for these *amici*.

Mr. Dodson has asserted in briefing that he secures most of the cases he prosecutes for seamen from some or all of the ministries listed as *amici* in this case. Plaintiffs/Appellees' Original Brief on the Merits, p. 25, n.8, *Raby v. M/V Pine Forest*, No. 90-35618 (9th Cir.). Deposition testimony in this case shows that his engagement in this very case was obtained through the assistance of *amicus* Tacoma Seamen's Center. Trial Exhibit 38, Deposition of Nelson R. Raby, February 12, 1990. Mr. Dodson has also described himself as an attorney for the ITF. Transcript of Hearing pp. 19-20, February 8, 1990, *Raby v. M/V Pine Forest*, No. CV-90-5038-JET (W.D. Wash.). He has at times represented the Philippine union AMOSUP and the Korean union FKSU, both affiliates of the ITF, in this case and in the related case of *Su v. M/V Southern Aster*, for which certiorari has also been sought from this Court. AMOSUP was a prevailing plaintiff in the trial court in this action, but when its entire judgment was reversed on appeal elected not to pursue review in this Court.

The close, interlocking relationship between Mr. Dodson, the petitioners and *amici* insures that the interests and arguments of all of them have been fully represented in his briefing for the petitioners. In addition, the interests identified by the ministries and the ITF as their interests are essentially the interests of the petitioners themselves. The ministries assert no interest of their own or of any parties or groups other than foreign seamen. Their only interest is as advisers to seamen – people who help them in a foreign port and advise them as to their legal rights. Needless to say, the ITF's role as a union is also representative of seamen. As the Court will see, and as the Ninth Circuit implicitly recognized, it is the ITF that has always been the true party in interest in this case with the Filipino seamen plaintiffs serving as richly rewarded surrogates. *Su v. M/V Southern Aster*, 978 F.2d 462, 465 (9th Cir. 1992).

II.
AMICI PRESENT NO NEW MATTER

The motion describes no new facts – adjudicative or legislative – that *amici* wish to bring to the attention of the Court. Nor does it identify any new legal argument or policy consideration. Rather, its argument merely tracks part of the petition for certiorari.

III.
AMICI SEEK NOT TO ASSIST, BUT TO MANIPULATE THE COURT

Since *amici* have no interests other than interests already represented in the petition and add no new matter to that document, the purpose of their papers can only be tactical and rhetorical – to repeat the arguments already made and create the impression that this is a case

of great importance and that many parties other than the plaintiffs disapprove of the Ninth Circuit's decision. This tactical use of the *amicus* privilege conflicts with its purpose and the role of an *amicus* as a "friend" of the Court.

In addition, the failures of candor reflected in *amici*'s papers disqualifies them as friends of this Court. The allegation that defendants told plaintiffs or any other seamen that they would be blacklisted and never work again if they demanded their lawful wages is false and was supported by no testimony – even of the plaintiffs – or any other evidence. The allegation that the seamen were "cheated" is another misrepresentation repeated frequently by petitioners' briefing in this action, but contradicted by their own testimony and clearly false, as the Ninth Circuit recognizes. *Id.* at 472-73.

CONCLUSION

The motion for leave to file an amicus brief in support of the petition for certiorari should be denied.

Respectfully submitted,

ROBERT I. SANDERS
WOOD TATUM WONACOTT
& LANDIS
1001 S.W. Fifth Avenue
Suite 1300
Portland, Oregon 97204
(503) 224-5430
Counsel of Record

WILLIAM R. BISHIN
1111 Third Avenue
Suite 1865
Seattle, Washington 98101
(206) 682-1584
Attorneys for Respondents.

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Supreme Court, U.S.
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No. 92-1316

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NELSON R. RABY, *et al.*,

Petitioners,

v.

M/V PINE FOREST, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT I. SANDERS*
JOE D. BAILEY
WOOD TATUM WONACOTT & LANDIS
1001 S.W. Fifth Avenue
Suite 1300
Portland, Oregon 97204
(503) 224-5430
**Counsel of Record.*

WILLIAM R. BISHIN
1111 Third Avenue
Suite 1865
Seattle, Washington 98101
(206) 682-1584
Attorneys for Respondents.

April 9, 1993

Washington, D.C. • THIEL PRESS • (202) 328-3286

QUESTIONS PRESENTED: RESPONDENTS' COUNTERSTATEMENT

1. Whether this Court should recognize a federal maritime tort of blacklisting which punishes conduct consisting solely of truthful, relevant statements written in response to a lawful governmental request for information.

2. Whether a court of appeals' unwillingness to elaborate upon its reasons for overturning a small back wages award, which can be shown by simple arithmetic to be clearly erroneous, is a ground for granting certiorari, especially when the petition makes no attempt to show that the back wages award was not clearly erroneous.

3. Whether the signing of a receipt for a specified wage should be treated as a "demand" for half of that wage within the meaning of 46 U.S.C. §10313(e).

4. Whether a seaman is entitled under 46 U.S.C. §10313(f) to the balance of his wages from his employment on a vessel only at the time his employment terminates.

5. Whether the release of seawater used for ballast by a vessel should be treated as a discharge of "cargo" within the meaning of 46 U.S.C. §10313(f).

Pursuant to Sup. Ct. R. 29.1, notice is given that:

1. The parent company of Delica Shipping, S.A. is Transocean Bulk Carriers, S.A., which owns 100% of the stock of Delica Shipping, S.A. Delica Shipping, S.A. has no subsidiaries or affiliates.

2. Inui Steamship Co., Ltd. owns 100% of the stock of Transocean Bulk Carriers, S.A. Inui Steamship Co., Ltd. has no parent corporation.

Page

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

STATEMENT UNDER RULE 29.1. ii

COUNTERSTATEMENT OF THE CASE. 1

A. Petitioners' Misstatements of Fact and of the Record. 2

B. The Notations in the Seamen's Books 4

C. The Back Wages Paid by Defendants Shortly After Suit Was Filed and the Award of Additional Wages. 6

REASONS WHY THE WRIT SHOULD BE DENIED

I. There Is No Conflict in the Circuits on Whether the Mere Imparting of Truthful Information Can Create Liability for the Tort of Blacklisting 9

II. The Considerations Relevant to the Blacklisting Question Have Not Matured Sufficiently to Justify Review Now. 13

III. The Blacklisting Issue is Not of Sufficient Importance to Justify This Court's Review at This Time. 15

IV. The Ninth Circuit's Unwillingness to Elaborate Upon Its Reasons for Overturning the Award of Additional Back Wages is No Ground for Granting Certiorari 17

V. Petitioners' Bizarre Interpretations of the Seamen's Wage Act Have Not Been And Are Not Likely to be Adopted by Any Court of Appeals and Do Not Require This Court's Attention 19

VI. Because of the Absence of Any Significant American Interest in the Outcome of This Case, None of the Questions Presented by Petitioners Should Be Reviewed 22

CONCLUSION 24

Page

APPENDIX:

I. Excerpts re *Blacklisting* from Parties' Briefing on Appeal in the Ninth Circuit:

- Excerpts from Brief of Appellants (Blacklisting) 1a
- Excerpts from Plaintiffs/Appellees' Original Brief on Merits (Blacklisting) 7a
- Excerpts from Reply Brief of Appellants (Blacklisting) 16a

II. Excerpts re *Back Wages* Awarded to Individual Plaintiffs from Parties' Briefing on Appeal in the Ninth Circuit:

- Excerpts from Brief of Appellants (Back Wages) . . . 19a
- Excerpts from Plaintiffs/Appellees' Original Brief on Merits (Back Wages) 41a
- Excerpts from Reply Brief of Appellants (Back Wages) 45a

III. Trial Exhibit 6A:

- Calculation of Wages Due Dodson Plaintiffs by Dr. G. Randolph Rice 51a

TABLE OF AUTHORITIES

Cases:

Alier v. Sea Land Service, Inc., 465 F. Supp. 1106 (D.P.R. 1979) 21

Allen v. Safeway Stores, Inc., 699 P.2d 277 (Wyo. 1985) 12

C.R. Bard, Inc. v. Wordtronics Corp., 235 N.J. Super 694, 561 A.2d 694 (1989) 12

Carroll v. Protection Maritime Ins. Co., 512 F.2d 4 (1st Cir. 1975) 9-11

Chung Yong Il v. Overseas Navigation Co., 774 F.2d 1043 (11th Cir. 1983), *cert. denied*, 474 U.S. 1177 (1986) 21

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) 14

Cases, continued: Page

Fitzgerald v. Liberian S/T Chryssi P. Goulandris, 582 F.2d 312 (4th Cir. 1978) 20

George A. Fuller Co. v. Chicago Coll. of Osteopathic Medicine, 719 F.2d 1326 (7th Cir. 1983). 12

Golden v. Newport Tanderks Corp., 1973 AMC 1030 (N.D. Cal. 1972) 21

Griffin v. Oceanic Contractors, 458 U.S. 564 (1982) 21

International City Management Asso. Ret. Corp. v. Watkins, 726 F.Supp. 1 (D.D.C. 1989) 12

Jose v. M/V Fir Grove, 801 F. Supp. 349 (D. Or. 1991) 23

Liebe v. City Finance Co., 98 Wis.2d 10, 295 N.W.2d 16 (Wis. App. 1989). 12

Pino v. Protection Maritime Ins. Co., 599 F.2d 10 (1st Cir. 1979) 9-11

Scussell v. Balter, 386 So.2d 1227 (Fla.App. 3d Dist. 1981) 11

Shilman v. United States, 164 F.2d 649 (2d Cir. 1947), *cert. denied*, 333 U.S. 837 (1948). 20

Sigalas v. Lido Maritime, Inc., 776 F.2d 1512 (11th Cir. 1985) 20

Sisson v. Ruby, 497 U.S. 358 (1990). 14

Smith v. Atlas Off-Shore Boat Service, 653 F.2d 1057 (5th Cir. 1981) 9-11

Su v. M/V Southern Aster, 978 F.2d 462 (9th Cir. 1992) 1, 13, 17, 19

The Annie M. Smull, 1 Fed. Cas. 983 (1872) 20

The Cubadist, 252 F. 658 (S.D. Ala. 1918), *aff'd.*, 256 F. 203 (5th Cir.), *cert. denied*, 249 U.S. 618 (1918). 20

The Mary, 16 Fed. Cas. 946 (D.Me. 1838) 20

The Velma M. Hamlin, 40 F.2d 852 (4th Cir. 1930) 20

Windward Shipping v. American Radio Assn., 415 U.S. 104 (1974). 17

Cases, continued: Page

Yaindl v. Ingersoll Rand Co., 422 A.2d 611 (Pa. Super. 1981) 11-12

Yoffe v. Calmar S.S. Corp., 23 F. Supp. 629 (N.D. Cal. 1938) 21

Statutes:

8 U.S.C. §1281. 16

46 U.S.C. §597. 16

46 U.S.C. §10313 . . . . . 7, 13, 16, 19-20, 22-23

Restatement (Second) Torts §772(a) 9-14

Other Authorities:

Northrup & Rowan, *The International Transport Workers Federation and Flag of Convenience Shipping* (Univ. Pa. Phil. 1983) 16

S. Rep. No. 98-56, 98th Cong., 1st Sess., p. 1, 5-7, 10 (1983) 21-22

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Respondents M/V PINE FOREST, Delica Shipping, S.A. and Inui Steamship Co., Ltd. respectfully request that this Court deny the plaintiffs' petition for writ of certiorari to review portions of the decision and opinion rendered in this case by the Ninth Circuit Court of Appeals on October 14, 1992, and reported at 978 F.2d 462.

COUNTERSTATEMENT OF THE CASE

This Counterstatement focuses on those factual and record matters most relevant to the certiorari decision, but provides a very brief introductory summary of the case for the Court's convenience. A more detailed overview of the case appears in Respondents' Cross-Petition for Writ of Certiorari, which is incorporated by reference.

This case arises out of the ongoing economic contest between Western seamen's unions led by the London-based International Transport Workers Federation (the "ITF") and a tacit alliance of flag of convenience ("FOC") vessels and Asian nations supplying crews for those vessels. As part of a campaign to destroy flag of convenience shipping and recapture seafaring jobs for Western seamen, the ITF sought to force FOC vessels to pay wages comparable to those demanded by Western European unions. Vessels which did not pay these wages would be denied loading, unloading and pilotage services in those Western ports where ITF affiliates had the power to enforce the campaign.

Asian manning agents devised an "ITF program" to counter the ITF campaign. They arranged for the creation of fictitious wage documents – such as wage receipts and shipping articles – to make ITF inspectors believe that their clients were paying ITF wages when they were actually paying a much lower, Asian rate. This case involved an FOC vessel called the PINE FOREST. The vessel was registered in Vanuatu, beneficially owned by Japanese interests and manned by a Filipino crew which had agreed to participate in the generation of fictitious wage information. That crew worked on the vessel without incident for the first ten months of its twelve-month engagement, receiving its agreed-upon wage monthly while signing receipts for both that wage and the ITF wage. Then, suddenly, while the vessel was stopping in Tacoma, several crew members filed suit for the ITF wages they had been pretending to receive and for tort damages as well.

A. Petitioners' Misstatements of Fact and of the Record

In their depositions and at the trial, the seafarers presented no evidence that they had ever had any objection to their jobs, to their wages or to their roles in the ITF program until they met Richard J. Dodson, a Louisiana lawyer who had arranged to be in Tacoma while the PINE FOREST was there. Their complaint claimed, however, that they had been promised the ITF wage, that the promise was fraudulent, and that they had been forced to sign the false wage receipts by threats that they would not be given any pay if they did not do so.

These allegations were shown to be completely false by depositions of the seamen taken only two weeks after the complaint was filed. They were not repeated in the

pre-trial order or in testimony at trial. Despite the trial court's extraordinarily favorable award to plaintiffs, it did not find that there had been such a false promise or that the seamen had been forced to sign the wage receipts.

Nevertheless, the allegations surfaced again on appeal, this time embroidered with new misstatements of the facts and the record. For example, the Dodson plaintiffs argued in the Ninth Circuit – as they have argued here – that the fictitious wage information which defendants' manning agent and crew created was unrelated to ITF disruption of FOC shipping.[1] They asserted, although the record was clearly to the contrary, that defendants had never been injured by the ITF and that "ITF harassment" was just defendants' euphemism for a demand that seamen be paid their agreed-upon wages. They never attempted to explain, however, why the manning agents would go to the trouble of creating fictitious wage information, if it was not to fend off ITF "industrial action." Plaintiffs admitted that they were quite willing to work for the wage they were in fact paid and thus there was no need or point in trying to deceive them.

Among the most outrageous assertions on appeal is the one that attempts again to explain away the seafarers' signing of the false wage receipts and at the same time establish a basis for the trial court's award of $14,300,000 in mental distress and punitive damages. This new assertion was that the seamen signed the receipts because defendants had threatened to fire and blacklist them if they objected. Although the assertion has been

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[1] Their co-plaintiff, AMOSUP, the Philippines union that had joined the action in the names of eight other former or current PINE FOREST crewmembers (called the "AMOSUP Plaintiffs" in this case), took the opposite tack. It candidly conceded that the fictitious wage information was directed at the ITF.

made repeatedly in Mr. Dodson's briefing, it has never been supported by any evidence whatsoever. No seaman ever testified that he was threatened, coerced, oppressed or mistreated in any manner. Specifically, not one seaman testified that he was told that he would be fired or blacklisted if he did not sign a wage receipt or if he complained about the wage he actually received. Nor was there any evidence to support the assertion in this Court that defendants had a policy of blacklisting any seaman who failed to go along with the ITF program or filed suit for the ITF wage.

Plaintiffs' counsel repeatedly pleaded that the seamen had demanded the full ITF wage each month. But plaintiffs' depositions contradicted this. No seaman would testify that such a demand had been made. It turned out that what plaintiffs' counsel was calling "demands" were the false receipts the seafarers had signed.

Finally, plaintiffs' briefing has repeatedly attempted to create the false impression that they were fired for bringing this action. This attempt also contradicts the record and the admission in the pre-trial order and the instant certiorari petition that they requested repatriation on filing this action. Plaintiffs were not fired. At their counsel's direction, they quit, leaving defendants to find essential replacements while stranded in a foreign port.

B. The Notations in the Seamen's Books

Petitioners' so-called "blacklisting" claim arose when they left the PINE FOREST, nine days after they had arrested the vessel. The Philippines Coast Guard requires Filipino seamen to carry a seaman's book, with a page for each vessel on which they ship. That page requests information under various headings, including the heading,

"CAUSE OF DISCHARGE." Next to that heading the master entered the notation: "Requested repatriation upon filing wage claim to arrest vessel."

Petitioners have not claimed in this lawsuit that the captain did not have an obligation under Philippine law to write something next to that heading. Nor that the statement that was made was unresponsive or offered more information than was called for by the coast guard. They have never claimed that the statement was false in any respect; and in their petition plaintiffs now admit that it was true. Nor have the seafarers in any of their papers suggested a truthful, responsive notation that should have been made instead of the one they criticize.

Petitioners did not complain that the notations caused any of them to lose a particular job that he would have taken. Instead, they claimed that the notations would prevent them in the future from ever securing a seafaring job from anyone. Their claims were accepted by the trial court, which awarded the thirteen of them – all able-bodied workers – a total of $6,800,470 as damages for lost future-income. This was based on their economic expert's assumptions that the seamen would be unemployable for the remainder of their working lives at any job, that they would have been paid ITF wages in every future job, and that they would have been constantly employed twelve months a year until they retired. There was no evidence at trial to support any of these assumptions. In addition, it appears that of the undifferentiated total judgment of $1,300,000 for mental distress and $13,000,000 for punitive damages that the court also awarded them, $650,000 in mental distress damages and $6,500,000 in punitive damages were attributed to the notations.

From the beginning, defendants had purely legal objections to the blacklisting claim: to the applicability of

American law to the issue (both under general conflicts principles and also under the rule that a vessel is ordinarily governed by the law of its flag); to the propriety of an American court's entertaining a claim so intimately related to Philippines facts, parties, witnesses and policies; to the correctness of exercising admiralty jurisdiction where the injury was projected to occur on land in a foreign country; and to the doctrinal validity and constitutionality of the claim even under American law, where it was obvious that the notations were true and had been made in response to a valid governmental request.

After the trial, defendants could add to this list strictly evidentiary objections – for on the great bulk of the factual issues, plaintiffs had failed to introduce sufficient evidence to support their claim. To better understand the bona fides of the blacklisting claim, see the parties' relevant appellate briefing below, at pp. 1a-17a of the Appendix.

C. The Back Wages Paid by Defendants Shortly After Suit Was Filed and the Award of Additional Wages

On February 13, 1990, two weeks after the PINE FOREST was arrested, defendants paid Mr. Dodson on demand the sum of $267,586. This sum was supposed to represent the difference between the amounts his clients had been paid each month and the amounts they would have been paid under the ITF wage scale they claimed to be applicable. On May 8, 1990, however, their damages expert, G. Randolph Rice, testified in a deposition that plaintiffs had been overpaid by $15,610. Tr. Ex. 28, Rice 4, 5, ex. 3 (introduced at trial as Tr. Ex. 6A). See p. 51a, below. Plaintiffs' counsel on the record

confirmed this ("In other words, we were overpaid slightly . . ."). *Id.* 5:25, 6:1-4, Ex. 3.

In a set of Proposed Findings of Fact filed before trial, Mr. Dodson's plaintiffs state that they were fully paid their back wages. DN 149/150, p. 7, para. 7. In the pre-trial order and at trial, they made no further claim for back wages. Dr. Rice testified again that they had been overpaid. Tr. 92-93, Tr. Ex. 6A. Mr. Dodson, in closing for all plaintiffs, asked for back wages for the AMOSUP plaintiffs, but not for his own clients. Tr. 374.

Thirty-five days later, on June 27, 1990, Mr. Dodson filed a proposed set of findings and conclusions which claimed that his clients were still due back wages of $7,206.02. ER 831-832. This amount allegedly represented wages from January 24, 1990, to February 8, 1990, which he now alleged were not included in the $267,586 he had accepted on February 13, 1990. He did not claim this to be consistent with Dr. Rice's calculations which determined plaintiffs' wages not through January 24, 1990, but through February 16, 1990. See p. 51a below. The issue was important, because if any amount of back wages was found still to be due, it would partially support an award of perhaps millions of dollars in penalties under 46 U.S.C. §10313(g).

In its Findings and Conclusions, the trial court accepted the finding that the individual plaintiffs were entitled to additional back wages, but instead of the $7,206.02 claimed by Mr. Dodson, it found without explanation that the individual plaintiffs were still due $15,019.20. When the specific individual back wages awards to each of these seamen were listed in a later Finding, however,

they totaled not $15,019.20, but $23,696.09. FF 33 pp. 9-10.[2]

Determination of the back wages due the plaintiff would have been a simple proposition once the amoun they should have been paid each month was multiplie by the number of months they worked and the produc reduced by the amount they were actually paid. Thus if a particular plaintiff should have made $2,000 pe month, worked for 11 months and was paid only $1,00 per month, the back wages due him would be easil calculated as $11,000. Complications were created though, by the fact that ITF compensation consisted o several elements that had to be derived from various sec tions of a model ITF agreement and its annexes and b the fact that there was disagreement at various points o the starting and ending dates of the seamen's employ ment on the PINE FOREST.

To avoid these complications, defendants in thei opening brief on appeal simply accepted the Dodso plaintiffs' position on the amounts each seaman shoul have been paid each month. Defendants then calculate back wages due based on the employment starting an ending dates the Dodson plaintiffs had urged at variou points in the litigation. These calculations showed tha under any of the possible assumptions, these plaintiff had been overpaid and were due nothing. These calcula tions, all of which were presented to the Ninth Circui panel, appear at pp. 24a-27a, 30a-40a of the Appendix.

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[2]Judge Jack E. Tanner presided at the trial. Defendan assigned his prejudice, partisanship and general judicial misconduc as grounds for reversal or, minimally, for assignment of a ne judge should there be a remand. The Court of Appeals reversed o the merits, there was no remand and these issues were no addressed.

The Dodson plaintiffs asserted in response that defendants had used the wrong number of months in their back wages calculation. They did not demonstrate, however, by performing a calculation using the allegedly correct numbers, that the $267,586 was an underpayment. See 41a-44a, below.[3] In their Reply Brief defendants took plaintiffs' numbers, performed the calculation, and showed that even with plaintiffs' new figures, the $267,586 remained an overpayment. See 45a-49a, below.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THERE IS NO CONFLICT IN THE CIRCUITS ON WHETHER THE MERE IMPARTING OF TRUTHFUL INFORMATION CAN CREATE LIABILITY FOR THE TORT OF BLACKLISTING

The Court of Appeals avoided a thicket of jurisdictional, procedural, evidentiary and substantive issues raised by plaintiffs' blacklisting claims by simply holding in accord with the second Restatement that imparting truthful information, no matter its motive, cannot in itself constitute an illegal interference with prospective contractual relations. Restatement (Second) Torts §772(a). Petitioners claim that this holding conflicts with the First Circuit's decisions in *Carroll v. Protection Maritime Ins. Co.*, 512 F.2d 4 (1st Cir. 1975), and *Pino v. Protection Maritime Ins. Co.*, 599 F.2d 10 (1st Cir. 1979), and the Fifth Circuit's decision in *Smith v. Atlas Off-Shore Boat Service*, 653 F.2d 1057 (5th Cir. 1981). They also claim, citing two cases, that Section 772(a)

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[3] Although the Dodson plaintiffs claimed that they were owed additional back wages, they did admit that the trial court award was erroneous. See p. 43a, below.

has been disapproved by State courts. None of thes assertions are true.

There is no conflict between the Ninth Circuit and an other circuit regarding the soundness of Section 772(a) In *Carroll*, seamen who had earlier brought persona injury actions against their employers sued a number o insurance companies. The carriers were alleged to hav notified vessel owners that they would not cover some o the plaintiffs and would cover others only at supranorma rates. 512 F.2d at 5. As a result, plaintiffs alleged, ves sels discharged them or refused them employment. *Ibid* The First Circuit ruled that plaintiffs had stated a prim facie case of interference with contractual relations. *Id* at 6. It noted, however, that because of the posture o the case it was not passing on the applicability of an possible defenses.

The conduct in *Carroll* consisted of far more than fu nishing truthful information. There defendants use their economic power to force plaintiffs' employers no to hire them. *Pino* was very similar, involving the sam defendant insurers, who were again deterring vesse owners from hiring seafarers by charging their prospectiv employers higher premiums when they did so. The issu of whether the mere imparting of truthful informatio was a defense was not raised or discussed. Again, sinc the conduct complained of consisted of the naked use o economic power to force employers to deny the plaintif jobs, it would not have been protected by the Sectio 772(a) defense in any event. Thus any pronouncemen on the subject would have been *obiter dictum*.

The *Smith* case did not involve interference with pro pective contractual relations, but an alleged wrongful di charge. Plaintiff's claim was that he had been discharge

by the defendant employer, because he had refused to settle a personal injury claim and had instead sued the defendant under the Jones Act. The court held that this ground for discharge was against public policy and therefore tortious. The imparting of truthful information was not a part of the challenged conduct and was not raised as a defense.

Since neither *Carroll, Pino* nor *Smith* involved Section 772(a), the Ninth Circuit created no conflict with any of those cases by following Section 772(a) in this case. Plaintiffs do not cite any federal decision expressing a reservation about the soundness of the section. Defendants have not found any. Nor have the parties found a state court which does so.

Plaintiffs mistakenly claim that *Scussell v. Balter,* 386 So.2d 1227 (Fla.App. 3d Dist. 1981), and *Yaindl v. Ingersoll Rand Co.,* 422 A.2d 611 (Pa. Super. 1981), are state cases which refused to follow Section 772(a). *Scussell* did not even involve 772(a); it involved 772(b) which makes it an absolute defense to give a third person "honest advice within the scope of a request for the advice" even if the adviser intends to interfere with a prospective contractual relation. In *Scussell,* the Court held not that Section 772(b) was not good law, but that the section was "inapplicable" to the facts of that case, because of "Scussell's active involvement in Wolf's affairs and of his personal motivations and ulterior purposes for securing Wolf's withdrawal from the undertaking with" plaintiff. 386 So.2d at 1228-29. The *Scussell* court is no more specific than this about the facts, but the references to "active involvement" and "ulterior purposes" suggest that defendant did not meet the requirements of the defense, in that advice was not requested, but volunteered, and may not have been "honest." In any event,

the reference to the section's inapplicability implici meant that it would be applied when the facts warrant it.

Yaindl is typical of many cases plaintiffs have cited this case. Not only does it not support their position takes the opposite position. The communications in th case were either false or were threats to use econon power against a potential employer. The case specifica discusses Section 772(a), but rather than disapprove expressly invokes it as the law of Pennsylvania. 422 A. at 623, n.14 ("Of course, were the jury to conclude th Sheedy imparted only truthful information to Desh Sheedy's interference would not be improper. Resta ment (Second) of Torts §772 (1979)".)

In this case, of course, the facts are stronger th required by Section 772(a), because the truthful inform tion was imparted in response to a request by a gove mental body. Thus even if there were a decision ho ing that truthful statements in themselves could co stitute a tortious interference, it might well be disti uishable and therefore not in conflict with the Nin Circuit's view in this case. But even that decision has n been shown to exist. Additional cases which ha acknowledged the authority of Section 772 inclu *Liebe v. City Finance Co.*, 98 Wis.2d 10, 295 N.W. 16, 20 (Wis. App. 1989); *International City Manag ment Asso. Ret. Corp. v. Watkins*, 726 F.Supp. 1, (D.D.C. 1989); *Allen v. Safeway Stores, Inc.*, 699 P. 277, 280 (Wyo. 1985); *C.R. Bard, Inc. v. Wordtron Corp.*, 235 N.J. Super 694, 561 A.2d 694, 697 (198 *George A. Fuller Co. v. Chicago Coll. of Osteopath Medicine*, 719 F.2d 1326, 1332 (7th Cir. 1983). Becau of the Restatement's position and the cases adopting the law in this area is already uniform, and it is likely

continue to be uniform. Concerns about uniformity, therefore, would not suggest that this Court should devote its limited resources to the subject.

II.
THE CONSIDERATIONS RELEVANT TO THE BLACKLISTING QUESTION HAVE NOT MATURED SUFFICIENTLY TO JUSTIFY REVIEW NOW

Plaintiffs seem to be making two related arguments: first, that the Restatement (Second) is simply wrong not to punish truthful communications if they are motivated by desire to injure; second, that even if the Restatement might be correct generally it should not be followed where the communication, however, truthful, might deter seamen on foreign vessels from suing under Section 10313.

Neither of these issues has really been confronted in a written opinion by any federal or state court, not even by the Ninth Circuit panel which wrote the decision in this case. Defendants' opening brief in the Ninth Circuit raised the Section 772(a) defense in a brief statement of the relevant doctrines. Plaintiffs in their response ignored defendants' doctrinal argument and authority, including Restatement Section 772(a). See pp. 7a-15a, below. The Ninth Circuit, having been presented with no attempt to challenge or distinguish Section 772(a), simply followed the Restatement and found that the notations were not an "improper" interference with plaintiffs' employment prospects. The court did not identify, analyze, or discuss the underlying constitutional and policy issues. 978 F.2d at 475. The first time plaintiffs attacked the Restatement was when they petitioned the Ninth Circuit for rehearing. The motion was denied without opinion.

Thus, if this Court grants certiorari to decide whethe the truthfulness of defendants' notations should be a absolute defense to a maritime tort of blacklisting, will be the first court to address and consciously resolv the policy and constitutional issues raised. It will no have the benefit of any court's analysis of the issue, no of the community's experience with that court's dec sion. In the absence of some emergency or some pres ing and chronic social problem, none of which has bee shown by plaintiffs, this by itself is grounds for denyin the writ.

But there are additional reasons why this is not th appropriate time to pass upon the soundness of 772(a First, the question raised is one which should not hav been reached below. The alleged tort involves solel foreign parties on a foreign vessel. In the absence of fed eral legislation providing otherwise, the law applied t the notations should have been foreign law. In addition even if foreign law was not controlling, there was n admiralty jurisdiction and thus no occasion to opin about the requirements of an admiralty tort of black listing. This is because the tort could not be completed – and therefore would not occur – until the plaintiff sea men were denied jobs on land in the Philippines. Thus the alleged tort did not occur on navigable waters and th locus requirement of admiralty law was not satisfied *Sisson v. Ruby*, 497 U.S. 358, 362-363 (1990); *Execu tive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S 249, 261 (1972) (maritime locality necessary, though no sufficient).

III.

THE BLACKLISTING ISSUE IS NOT OF SUFFICIENT IMPORTANCE TO JUSTIFY THIS COURT'S REVIEW AT THIS TIME

Petitioners have presented no evidence that there is a significant problem of blacklisting – whether by truthful statements or otherwise – which is of such importance that it requires this Court's attention. There is no showing that American seamen are not adequately protected from unfair employment practices by federal labor legislation and collective bargaining agreements. Nor that most foreign seamen today do not also have adequate protections. In this case, the Filipino seamen have recourse to the facilities of the Philippine Overseas Employment Administration, to which their manning agents and the vessel owners are subject.

Plaintiffs may argue that they cannot expect a sympathetic response from the POEA, because the POEA has supported vessel owners when Filipino seamen have violated their agreements with their manning agents and sought ITF wages in a foreign port. But this has not been established on the record. Nor has there been any showing that Philippine courts would not give redress against an abusive foreign vessel owner if the POEA did not. The Dodson plaintiffs have in fact cited Philippine cases showing that those courts will protect Filipino seafarers. See their answering brief in the Ninth Circuit. Plaintiffs/Appellees' Original Brief on Merits, pp. 10-11.

But if it were true that the seamen would not be supported at home, this would be an expression of a conscious economic policy. American courts which insisted on giving these Filipino seamen a remedy they would not have in their own country would be acting to undermine that policy. To be sure, plaintiffs claim it to be United

States policy to counter the Philippines' alliance with FOC vessels because flag of convenience shipping allegedly deprives Americans of seafaring jobs they would otherwise have. But this policy argument is based on the legislative history of a statute enacted in 1915 – a statute which merely made the half wages provision of the seamen's wage act – then 46 U.S.C. §597, now Section 10313(e) – applicable to foreign vessels when in a U.S. port. Since then, there have been revolutionary changes in international shipping, labor relations and trade, while the American merchant marine has continued to decline radically. Yet Congress has not attempted to make the half wages act a more effective instrument for whatever ulterior purposes it might have had when enacted. To the extent that Section 597 was meant to provide indirectly a mechanism for equalizing wages, it was proved a failure long ago and in fact was effectively nullified by subsequent immigration and deportation legislation and policy. See 8 U.S.C. §1281 et seq. Brief In Opposition to Petition for Writ of Certiorari in *Su v. M/V Southern Aster*, No. 92-1319, pp. 15-22.

Flag of convenience shipping was not a significant factor in international shipping when Section 597 was enacted. Despite the rise of such shipping to a major role in international overseas trade and the growth of Asian seafaring since that time, the United States has done nothing to discourage such shipping. Indeed, in international conferences, it has refused to support the outlawing of such shipping. Northrup & Rowan, *The International Transport Workers Federation and Flag of Convenience Shipping*, 45-46, 231-232 (Univ. Pa. Phil. 1983). All of this shows that the policy which plaintiffs attribute to Congress is of little or no importance to it today.

In addition, this Court has declared that the struggle between FOC shipping and seamen's unions is one in which the judiciary in this country cannot take sides. *Windward Shipping v. American Radio Assn.*, 415 U.S. 104 (1974). Accordingly, the claim that this Court should protect these plaintiffs from defendants' truthful notations, because their government would not do so, implicates nothing of sufficient importance to justify this Court's attention to their putative cause of action.

IV.

THE NINTH CIRCUIT'S UNWILLINGNESS TO ELABORATE UPON ITS REASONS FOR OVERTURNING THE AWARD OF ADDITIONAL BACK WAGES IS NO GROUND FOR GRANTING CERTIORARI

> The Court of Appeals ruled that the petitioners were entitled to back pay at the full union scale described in the ship's articles. The shipowners paid this amount when they tendered $267,586.

Pet. for Writ of Cert. Appendix, p. A21; 978 F.2d at 472. This was an implicit holding by the court that the award of additional back wages – in either of the inconsistent amounts that the trial court found – was clearly erroneous. That conclusion was made explicit when the court reversed the trial court's entire judgment, except for the attorneys fees. Petitioners claim that the Ninth Circuit's unwillingness to set out its reasons for this conclusion justifies a grant of certiorari. Surely, petitioners must do more than show that the Ninth Circuit did not justify its conclusion; it must also make at least some showing that the court was wrong to overturn the award of additional back wages. This petitioners have not done. They merely assert that the Ninth Circuit "clearly erred," but do nothing to show that there were in fact any back wages due.

The briefing before the Ninth Circuit on this issue is set out in the Appendix pp. 19a-51a, esp. 45a-47a. It shows that the claim that plaintiffs were entitled to additional wages was wholly without merit and that the trial court's unexplained and inexplicable award of such wages was, indeed, clearly erroneous. This is a claim that should never have been made in a court of law. After the petitioners came up with a new theory of the months they had worked, they either never took the trouble, or deliberately refused, to multiply that new number by the ITF monthly wages and then to subtract the amount they had been paid. If they had discharged that elementary responsibility to the courts and to defendants before raising this post-trial claim, they would have known that even under their new theory they had still been underpaid.

Every day courts issue opinions which declare that they will not address assignments of error that are wholly without merit. The Ninth Circuit did not expressly make that ritual declaration here, but it did do so implicitly. In the absence of any showing that the back wages award was supported by substantial evidence, and in light of the fact that the Ninth Circuit was presented with a battery of patently unmeritorious claims, most of which it graciously, if unnecessarily, did address, it should not be required to do any more.

V.

PETITIONERS' BIZARRE INTERPRETATIONS OF THE SEAMEN'S WAGE ACT HAVE NOT BEEN AND ARE NOT LIKELY TO BE ADOPTED BY ANY COURT OF APPEALS AND DO NOT REQUIRE THIS COURT'S ATTENTION.

The plaintiffs argued below that a receipt for wages that the seafarers did not receive and knew they were not going to receive should be treated as if it was a demand under Section 10313(e) – and not only a demand, but a demand for half, not all, of the wages reflected in the receipt. In addition, they argued that since defendants did not pay the wages in the receipt, this amounted to a discharge of the seamen by operation of law requiring that they be paid all of their wages under Section 10313(f) – even though the seamen stayed on the vessel after they signed the receipts and continued to work and accept their normal wage.

Plaintiffs also argued that the seawater used for ballast should be treated as if it were cargo, but actually provided no affirmative reason for this counter-intuitive proposition, other than the assertion that the statute should be construed liberally in favor of seafarers and that the policy of the statute imperatively required it. Only in this Court have they claimed that the word "cargo" is ambiguous. Their assertion that the Ninth Circuit conceded this is just another of the falsehoods about the record and the facts which dot their papers in this case. The Ninth Circuit said not that "cargo" was ambiguous, but that Congress's intention in 1872 when it chose not to use the word "ballast" in the law regulating overseas vessels was ambiguous. 978 F.2d at 469.

Defendants believe that petitioners' "demand" and "cargo" arguments are so frivolous on their face that they

require no further attention. Plaintiffs' argument that every trip their vessel took was a "voyage" was equally unmeritorious, but this is not as apparent on its face, because the word "voyage" is ambiguous if considered only in the context of subsection (f) of Section 10313. The Court of Appeals recognized that in the context of the entire Wage Act, especially subsection (e), a voyage had to be coextensive with the entire term of the seamen's employment – and not with the duration of any particular trip or trips. What the court did not bring out was that this holding is long-settled law which was effectively endorsed by Congress in 1983 when it reorganized and clarified seamen's legislation. The cases go back to the 1838 case of *The Mary*, 16 Fed. Cas. 946 (D.Me. 1838):

> . . . . My opinion is, that the intention of the legislature was, that they [the number of days in which seaman should be paid] should begin to run from the time when the wages become due, that is, from the day when the term of service is completed. They are then of common right entitled to their wages.

See generally *The Annie M. Smull*, 1 Fed. Cas. 983, 984 (1872). The holding has been reaffirmed repeatedly since then.[4] There is no authority – and plaintiffs have

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[4] Among the cases so holding are *The Cubadist*, 252 F. 658, 660 (S.D. Ala. 1918) *aff'd* 256 F. 203 (5th Cir.) *cert. denied*, 249 U.S. 618 (1918); *The Velma L. Hamlin*, 40 F.2d 852, 853 (4th Cir. 1930); *Fitzgerald v. Liberian S/T Chryssi P. Goulandris*, 582 F.2d 312 (4th Cir. 1978); *Shilman v. United States*, 164 F.2d 649, 650-51 (2d Cir. 1947) *cert. denied*, 333 U.S. 837 (1948) (Hand, J.) (statute looks "towards payment to the seaman by his employer, at the termination of the employment, of all of his earned wages"); *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1521 (11th Cir. 1985) (wage claims are due and payable upon seaman's discharge);

[footnote continued]

cited none – disagreeing with it. Plaintiffs have argued that the decisions in *Griffin v. Oceanic Contractors*, 458 U.S. 564 (1982) and *Chung Yong Il v. Overseas Navigation Co.*, 774 F.2d 1043 (11th Cir. 1983), *cert. denied*, 474 U.S. 1177 (1986) conflict with the Ninth Circuit's decision here. But mere inspection of those opinions shows the claim to be baseless. In both cases, the plaintiffs' claim arose only after his employment had terminated. These cases are simply additions to the line of authority which the Ninth Circuit followed.

In 1983, Congress enacted a clarification, reorganization and codification of the laws relating to seamen, which was intended to be acceptable to all members of the shipping industry. S. Rep. No. 98-56, 98th Cong., 1st Sess., p. 1, 5-7, 10 (1983). The Senate Report states:

> The pertinent provisions of law have been freely reworded and rearranged, subject to every precaution against disturbing existing rights, privileges, duties or functions and consistent with the general plan of the U.S. Code. However, in our effort to adhere to existing law, we have not chained ourselves to the letter of the statute. Rather, we have chosen to follow its spirit. *Where court decisions*, opinions of officials such as the Attorney General or the Comptroller General, Executive orders, regulations, and well-established administrative practices *have established authoritative interpretations of*

Yoffe v. Calmar S.S. Corp., 23 F. Supp. 629, 630-31 (N.D. Cal. 1938) (statute operates "at the time the seaman leaves the ship and shipowner's liability under the statute must be determined as of that time."); *Golden v. Newport Tanderks Corp.*, 1973 AMC 1030, 1033 (N.D. Cal. 1972) (no double wage penalties when statute complied with as of time seaman left ship); *Alier v. Sea Land Service, Inc.*, 465 F. Supp. 1106, 1111 (D.P.R. 1979) (date that seaman leaves the ship "fixes the operation of the statute.")

> *these statutes, we have not intended to overrule them without expressly so providing.*

Id. at 9 (emphasis added). The reenactment of the Seaman's Wage Act with virtually no change from 1915, the last time it was revised, and with no relevant change since 1790, is an implicit declaration of what the Senate Report states – all established precedent is in effect codified thereby.

Thus the statutory holdings that plaintiffs want this Court to review are solid, sound law. Although the Ninth Circuit is the first to make some of them, there is no reasonable likelihood that other circuits will reach a different result on questions whose answers are as clear as these. This Court's review to assure uniformity would seem, therefore, to be unnecessary.

VI.

BECAUSE OF THE ABSENCE OF ANY SIGNIFICANT AMERICAN INTEREST IN THE OUTCOME OF THIS CASE, NONE OF THE QUESTIONS PRESENTED BY PETITIONERS SHOULD BE REVIEWED.

What has already been said about specific questions for which plaintiffs seek certiorari suggests and supports the more general point that none of the questions presented belongs in this Court. This is because the underlying facts in this case are not of significant interest to the United States and have only been made to appear otherwise by shrewd, if censurable litigation tactics.

Plaintiffs' purported claims when they filed suit in Tacoma were for wages they had not been paid under the articles and for fraud and emotional distress. Because all of the parties were foreign nationals or corporations and the litigated events and transactions occurred in the Philippines, Japan or on a vessel of foreign registry, the law

governing these claims was not American law. *Jose v. M/V Fir Grove,* 801 F. Supp. 349 (D. Or. 1991). The appropriate forum for this case, accordingly, would not have been an American forum. To be sure, an American admiralty court would have had the power to entertain the lawsuit. But absent violation of American law giving the action an American anchor, it would have been highly unlikely that such a court would have ignored controlling comity and *forum non conveniens* considerations.

Despite plaintiffs' spurious assertions to the contrary, the Seaman's Wage Act did not provide such an anchor. That Act would have come into play only if, while in a United States port, the seamen had demanded half of their unpaid wages, and had been refused, or if their employment on the vessel had been terminated, and the balance of their wages had not been fully paid. 46 U.S.C. § 10313(e) and (f). As we have seen, there was never any demand for half wages, and the seamen's employment had not terminated prior to the filing of the complaint.

Thus when this action was filed, plaintiffs had no bona fide statutory claim and their complaint would have been vulnerable to a motion to dismiss. To create at least a paper basis for mandatory federal jurisdiction, the preposterous constructions of the wage act discussed above were concocted – that a false wage receipt should be treated as a demand, that the seawater used for "ballast" was "cargo," and that a seaman was entitled to the balance of his wages at every stop his vessel might make during his employment.

If the specious tort theories – based on factual allegations to which the plaintiffs would not swear under oath – and the spurious statutory claims – in obvious conflict with the language, structure and history of the wage act – are disregarded, plaintiffs' action at the time it was

filed is reduced to what it in fact was: a suit for breach of a maritime contract. However valid that claim might have been, it was a foreign claim arising out of a foreign dispute involving a foreign country's economic needs and policies. The parties had agreed prior to the voyage that such disputes would be subject to the exclusive jurisdiction of the POEA and Philippines courts.

Reduced to their essence, the questions that petitioners would have this Court decide arise out of a case in which the United States has no significant interest, but in which a substantial amount of federal judicial resources have already been needlessly expended. That does not appear to be the kind of case for which this Court should grant certiorari.

CONCLUSION

For the reasons given, the Court should deny the Petition for Certiorari.

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Respectfully submitted,

WILLIAM R. BISHIN
WILLIAM R. BISHIN, P.S.
1111 Third Avenue
Suite 1865
Seattle, Washington 98101
(206) 682-1584

ROBERT I. SANDERS*
JOE D. BAILEY
WOOD TATUM WONACOTT & LANDIS
Suite 1300
1001 S.W. Fifth Avenue
Portland, Oregon 97204-1129
(503) 224-5430

*Counsel of Record.

Attorneys for Respondents

I.

EXCERPTS RE *BLACKLISTING* FROM PARTIES' BRIEFING ON APPEAL IN THE NINTH CIRCUIT

[Editor's note: Typographical errors, especially the numerous ones in Petitioner's Briefing below, have not been corrected.]

EXCERPTS FROM BRIEF OF APPELLANTS (BLACKLISTING)

Page 70, lines 11-13; pages 71 through 74, line 8

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VI.

THE CLAIMS PREDICATED ON THE NOTATIONS IN THE SEAMEN'S BOOKS WERE NOT WITHIN THE COURT'S ADMIRALTY JURISDICTION AND FAILED TO STATE A CLAIM FOR RELIEF BECAUSE THE NOTATIONS WERE TRUE

* * * *

A. The Court Had No Subject Matter Jurisdiction Over Plaintiffs' "Blacklisting" Claim

In its Findings and Conclusions, the court ruled that it had jurisdiction over the plaintiffs' claims under admiralty and maritime jurisdiction. *See* Conclusion of Law 1.[74] The Findings and the evidence were that the alleged injury to the plaintiffs – the loss of future employment – occurred in the Philippines. Accordingly, the court had no admiralty jurisdiction, because a tort consummated on land is not cognizable in admiralty. *Clinton v. Int'l Org. of Masters, Mates & Pilots,* 254 F.2d 370, 372 (9th Cir. 1958) (intentional interference with contractual relations is not a maritime tort when the alleged harm occurs on land); *Clinton v. Joshua Hendy Corp.,* 285 F.2d 199, 200 (9th Cir. 1960) (no admiralty jurisdiction over claim for interference with contractual relations with union

[74] A review of the transcript will show that before the trial Judge Tanner had indicated the blacklisting claims would not be tried. During the trial he changed his mind. E.g., Tr. 67, 68.

when libelous letter caused expulsion from union, because expulsion occurred on land); *Lamontagne v. Craig*, 632 F. Supp. 706, 709 (N.D. Cal. 1986) *aff'd per curiam*, 817 F.2d 556 (9th Cir. 1987) (no admiralty jurisdiction over defamatory libel where, although libel written at sea, publication and corresponding injury occurred on land).

B. Plaintiffs Had No Colorable Claim, Because, *Inter Alia*, the Notations Were True

Plaintiffs' claim that the notations injured them is a claim that they were injured in their trade or profession by a communication. This is a defamation claim. W. Prosser & W. Keaton, *The Law of Torts*, §112, p. 790-91 (5th ed. 1984); *see Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485 (1984) (product disparagement claim). The notations in the seamen's books were true. Truth is a complete defense to defamation. *See* Restatement (Second) of Torts §§558, 581A, comment a; *The Law of Torts, supra*, §116.

Plaintiffs may argue that the notations constituted intentional interference with prospective contractual relations. But truth is also a complete defense to that tort. Restatement (Second) of Torts §772, and comment b; *The Law of Torts, supra*, §130, p. 1010-1011; *George Fuller Co. v. Chicago College of Osteopathic Medicine*, 719 F.2d 1326, 1332 (7th Cir. 1983). In addition, plaintiffs do not allege or prove interference with a specific contractual expectancy, *see Calbom v. Knudtzon*, 65 Wash.2d 157, 396 P.2d 148 (1964); *King v. City of Seattle*, 84 Wash.2d 239, 525 P.2d 228, 233 (1974), or causation – that is, that they would have been employed by the prospective employer but for the defendant's

intentional and wrongful interference. *Locricchio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987).[75]

Plaintiffs may argue that the notations constitute the tort of outrage. Again, however, when the challenged conduct is expression, particularly public expression, truth is a complete defense. *Cf. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (*false* statement not actionable in claim for intentional infliction of emotional distress). In addition, passing for the moment the question of whether plaintiffs have established the first two elements of this tort, they have not established the element of "severe emotional distress," since they introduced no evidence of *any* emotional distress. See Section VII C, *infra*.

C. The Damages Awarded For Blacklisting Were Not Based on Evidence and Were Entirely Speculative

The damages award for blacklisting was based on the following assumptions.

1. That the 13 individual plaintiffs, all able-bodied men, would never work again.

2. That without the notations, plaintiffs would have received the wages in the model ITF world-wide collective agreement until retirement.

3. That every plaintiff would work 12 months a year every year for the rest of his life.

Each of these assumptions is preposterous and unsupported. There is absolutely no evidence in the record that these plaintiffs could not find some work at some

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[75] One of plaintiffs' witnesses testified that violation of their agreement with their manning agent was widely known in the Philippines and this, irrespective of the notations, would allegedly have made them unemployable. Tr. Ex. 28, Lafferty 73, 83.

time in the future. Although plaintiffs do offer some putative evidence that they could not obtain employment as merchant seamen for the rest of their lives, even that evidence was clearly manufactured for purposes of the trial and even then fails utterly to establish lifetime unemployability. Of the three seamen who testified at trial, only Raby actually "applied" for work. Tr. 229, Tr. Ex. 38, Raby 41 (5/19/90). The "application" was made by presenting his seaman's book to two manning agencies three weeks before trial. Tr. 211, 229, 237-238, Tr. Ex. 38, Raby 42, 51 (5/19/90).[76] When Raby went to these manning agencies, he was accompanied by a large crowd of interested parties, including other plaintiffs, his Philippine lawyer, and James Lafferty, an American lawyer employed by the Seaman's Church and one of plaintiffs' expert witnesses. Tr. 229, 237; Tr. Ex. 38, Raby 40-41 (5/19/90), Alvarado 57-58. The other two plaintiffs had waited downstairs while Raby presented his book and was purportedly turned away. *Ibid.* There was, of course, no evidence whatever from the other 10 individual plaintiffs on this issue.

The two manning agencies were not identified. No plaintiff had ever before worked for either of the two manning agencies. Tr. Ex. 38, Raby 43-44 (5/19/90), Alvarado 58. No written application was made. Nor did any plaintiff apply to Western Shipping, the agency which had employed plaintiffs for years before the lawsuit was filed and the only agency that was ever identified as a prior employer for these plaintiffs. Tr. 212, 237-238, Tr. Ex. 38, Raby 51 (5/19/90). See Statement of Facts.

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[76] In his deposition he admitted that he did not actually want work at that time. Tr. Ex. 38, Raby (5/19/90) 43. One of plaintiffs' witnesses testified that there were 110 to 120 manning agencies in the Philippines. Tr. Ex. 28, Lafferty 42. See also Tr. 211.

The other evidence presented by plaintiffs was a deposition containing the opinion evidence of James Lafferty,[77] who was offered as an expert on Philippine manning practices on the basis of four trips to the Philippines in the preceding several years. Tr. Ex. 28, Lafferty 19. This testimony was contradicted by Frederick Clemo, who testified that because of the skills of these plaintiffs and the high worldwide demand for qualified Philippine crews, he believed plaintiffs would be able to obtain work in two to three weeks. Mr. Clemo had been in the maritime industry for 58 years. Tr. 323. Whether Mr. Clemo's testimony is accepted or not, Mr. Lafferty's speculative opinion, based on his limited experience and hearsay, is insufficient to establish plaintiffs' claim that they would never work again in the shipping industry.

As to the assumption that plaintiffs would have received ITF wages for the rest of their lives, there is no evidence that any of these plaintiffs had ever been paid ITF wages before or had any expectation of ever obtaining them again. The wage scale AMOSUP negotiates for its members is much lower and a Blue Certificate could be obtained by paying that lower wage.

Finally, the assumption that plaintiffs would have worked twelve months per year in the future was wholly unsupported. Plaintiffs had no reason to expect that they would be permanently employed by defendant Delica. Nor did defendants have any legal obligation to employ plaintiffs once their contracts ended. *See, e.g., Smith v. Atlas Offshore Boat Service, Inc.*, 653 F.2d 1057, 1060 (5th Cir. 1981) (in absence of a definite employment term, seaman's employment is terminable at

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[77] Although listed as a witness in the pretrial order, plaintiffs did not call him at trial. The court apparently received Mr. Lafferty's deposition in its entirety.

will by either party). Obviously, merchant seamen's employment is from vessel to vessel and from contract to contract, rather than continuous. Plaintiffs introduced no evidence to support the notion that their employment differed from this pattern.

EXCERPTS FROM PLAINTIFFS/APPELLEES' ORIGINAL BRIEF ON MERITS (BLACKLISTING)

Pages 64, line 3, through 68, line 11; pages 72, line 7, through 74, line 15

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III.
THE SEAMEN PLAINTIFFS WERE VICTIMS OF MARITIME TORTS AND ENTITLED TO COMPENSATORY AND PUNITIVE DAMAGES

The Defendants complain bitterly about the trial judge's finding that their "intentional, fraudulent, and bad faith conduct" was tortious entitling Plaintiffs to both compensatory and punitive damages. The Defendants further complain that the trial judge did not identify the tort leading to the award of compensatory and punitive damages and that they were only vague references by the district judge to Plaintiffs being vulnerable and subject to intimidation and coercion. The record does not support Defendants' arguments or contentions. The trial court expressly held:

> "The seamen were in a very vulnerable position and were easily intimidated [FF No. 13]."
>
> The court finds that the conduct by the defendants at all times relevant herein was intentional, deliberate, reckless, callous, flagrant, malicious, indifferent, and unconscionable. That such conduct by the defendants was to intimidate, coerce, and punish the plaintiffs. Such conduct was in complete disregard of plaintiffs' rights. That defendants' conduct at all times relevant herein, violates the laws of the public policy of the United States." [FF No. 31]

The court further found that the making of the notations in the Seamen's Books made them unemployable and was for:

> "Such conduct of the defendants was for retaliation and punishment of the plaintiffs for requesting what they were lawfully entitled to, their wages. Defendants' conduct at all times relevant herein, caused plaintiffs duress, emotional duress, and prevented them from being employable as seamen." [CL No. 7]

The entire record of this matter supports the judgment of the district court. It is clear that Plaintiffs are entitled to support their judgment on any basis found in the record. *U.S. v. Aranson*, 696 F.2d 654 (9th Cir. 1983); *U.S. v. Humboldt County, Cal.*, 628 F.2d 549 (9th Cir. 1980). The tortious conduct was Defendants' intimidation, coercion, and duress each and every month Plaintiffs were on board the vessel. The tortious conduct was the intentional and deliberate violation of both the civil and criminal laws of the United States and the State of Washington. The tortious conduct was the intentional infliction of emotional distress and the intentional blacklisting of Plaintiffs prohibiting them from obtaining future employment. The tortious conduct was the Defendants' intentional breach of their covenant and duty of good faith and fair dealing with their employees and a complete breach of their special relationship and fiduciary relationship with Plaintiffs. The Defendants' statement that the Defendants conduct was not "so extreme as to go beyond the bounds of civilized decency" only tells us about the Defendants' value system of believing it to be legally and morally permissible to intentionally underpay its employees, require the execution of double books, and terminate and blacklist any employee who refused to comply. It is

respectfully submitted that if Defendants' double bookkeeping scheme, enforced by intimidation, duress, and coercion, and then blacklisting, does not go beyond the "bounds of civilized decency," little does. The record supports the award of both compensatory and punitive damages for Defendants' tortious conduct, which has been held to constitute "torts" under both the general maritime law and the common law.

Blacklisting is a tort, whether a maritime tort under the court's admiralty jurisdiction or a tort under state law. In *Pino v. Protection Maritime Ins. Co.*, 559 F.2d 10 (1st Cir. 1979), compensatory and punitive damages were allowed. Retaliatory action against employees has likewise been recognized as a tort, both on land and at sea. In *Smith v. Atlas Off-shore Boat Services, Inc.*, 653 F.2d 1057 (5th Cir. 1981), Judge Rubin allowed compensatory damages for the discharge of a seaman for having brought a Jones Act suit. In *Skirpan v. United Airlines*, 1988 WL 87039 (N.D. Ill.), the court awarded over $165,000 for compensatory damages and $750,000 punitive damages for Mr. Skirpan's discharge as a result of his bringing a workman's compensation suit. The Defendants blacklisted Plaintiffs with the specific intent of punishing them in retaliation for enforcing the rights granted them by Congress. Plaintiffs' blacklisting and retaliation claims are based on Defendants' wrongful interference with their future employment as seamen aboard oceangoing vessels, i.e., with maritime contracts. *Kamara v. S. Livanos & Co.*, 90 F. Supp. 435 (S.D.N.Y. 1952); *Pino v. Protection Maritime Insurance Co., Ltd.*, 454 F. Supp. 210 (D. Mass. 1976), aff'd. 599 F.2d 10 (1st Cir. 1979), cert. denied, 444 U.S. 900 (1979). Also, Plaintiffs' claim is derived from and is in furtherance of the federal maritime policy. Specifically, Defendants' retaliation

against the Plaintiffs for asserting claims to wages and penalties under 46 U.S.C. 10313 conflicts with the clear remedial purposes of that statute. The discharge of a seaman for enforcing his rights, even without interference with future employability and blacklisting is a tort under the general maritime law because of the shipowner's economic sanctions in retaliation for the plaintiff "seeking to recover what is due him or to intimidate the seaman from seeking legal redress." *Smith v. Atlas Off-Shore Boat Service, Inc., supra.* Accord: *Roberson v. Rebstock Drilling Co.,* Inc., 749 F.2d 1182, 1184 (5th Cir. 1985); *Merchant v. American S.S. Co.,* 860 F.2d 204, 209 (6th Cir. 1988).

It is undisputed that when the thirteen original Plaintiffs signed off the M/V Pine Forest on February 8, Captain Hayashi entered in each of their Seaman's Books as the reason for their discharge the notation "Requested Repatriation Upon Filing Wage Claim to Arrest Vessel." While Defendants argue that the entry was simply a benign, truthful statement of the reason for the termination of the seafarers' service on the M/V Pine Forest, the evidence establishes that the entry was placed in the seamen's books in retaliation for their having filed their wage claim and has had and will continue to have the intended result of preventing these seamen from gaining future employment in the maritime industry. Captain Hayashi told the Plaintiffs that they would never work again having brought the suit. The notations made in the seamen's books occurred two weeks after the notations in the seamen's book on the Fir Grove which clearly displayed the shipowner's true intent: "disable for future employment". The entry of the notations in the original 13 Plaintiffs' Seaman's Books were not required by law of the United States nor the Republic of Vanuatu, the

country of the vessel's flag. None of the Plaintiffs had remarks of that nature inserted in their Seaman's Books when they were discharged from previous vessels. The reference to Plaintiffs' bringing this action to enforce their wage claims effectively branded them as "trouble makers" in the eyes of Philippine manning agents, thereby rendering them virtually unemployable. The expert testimony of Lafferty that this entry effectively blacklisted these seamen was confirmed by the experience of the seafarers when they sought employment by two manning agencies but were denied employment when their seamen's books were examined. If further support were needed, it was provided, albeit grudgingly, by Defendants' witness, Captain Osena, director of FAME, who testified that he would be reluctant to hire seamen with such notations in their books for fear of jeopardizing his business.

Indeed, each seaman has testified that he was afraid to claim the wages contained in his shipping articles for fear that he would be subjected to reprisals for doing so. It is clear that the seamen's fears were well-founded. Not only was it apparently common knowledge, based on the known experience of other seafarers who had the temerity to make such claims, that such wage claims would be met with hostility and reprisals, but the Defendants in this case both implicitly and explicitly threatened the seamen with discharge and blacklisting if they filed a wage claim.

Damages have always been awarded under the general maritime law for intentional wrongful conduct by a defendant:

> "As under the common law of torts, a person may be liable under the general maritime law for intentional wrongs, such as conversion, . . ." Schoen-

baum, *Admiralty and Maritime Law* (1987), §4.7 "Intentional Wrongs."

In *The Lydia,* 1 F.2d 18 (2d Cir. 1924), the court expressly held that conversion was a maritime tort, stating:

> "The reason for the exercise of admiralty jurisdiction is that conversion is a tort, and a tort so elementary in its nature that it may be maintained even against an infant . . . , and if that tort is committed on navigable waters, admiralty has jurisdiction."

* * * *

Furthermore, the Defendants committed the tort of breach of their duty or covenant of good faith and fair dealing through their use of economic duress, threats, and coercion. The conduct of the Defendants in this case clearly violates the implied covenant, and justifies the imposition of tort remedies including punitive damages to vindicate the compelling societal interest in insuring the payment to employees their just wages. In *Tibbs v. Great American Insurance Co.,* 755 F.2d 1370 (9th Cir. 1985), the court affirmed a compensatory award of $200,000 and a punitive damage award of $600,000 for the insurance company's breach of its implied covenant of good faith and fair dealing in failing to perform its duty of defending the plaintiff in a separate trial in which the defendant was forced to appear in propria persona which resulted in a judgment in plaintiff's favor. This Court, in affirming the lower court, found that there was sufficient evidence to support a finding that the insurer had been guilty of "bad faith and is guilty of oppression, fraud, or malice."

The compensatory damages for loss of future income were computed in accordance with the strict guidelines mandated by the Ninth Circuit. The award of compensatory damages for emotional distress is supported by the record of this proceeding and the eleven months that Plaintiffs endured the intimidation, coercion, and duress of the shipowner, and further by their continuing endurance of unemployment because of the Defendants' blacklisting.

The punitive damages awarded by the district court are a finding of fact just as the award for compensatory damages and are supported by the record of this proceeding. In *Protectus Alpha Navigation v. N. Pacific Grain Growers*, 767 F.2d 1379 (9th Cir. 1985), this Circuit affirmed a punitive damage award of $500,000 based upon the grossly negligent acts of the defendant's employee and noted that punitive damages "serve the purpose of 'punishing defendant of teaching him not to do it again, and of deterring others from following his example.' " This Circuit cited with approval the standard enunciated in *Smith v. Wade*, 103 S.Ct. 1625 (1983), in which the United States Supreme Court stated:

> "We are content to adopt the policy of the common law that reckless or callous disregard for the plaintiff's rights, as well as intentional violation of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages."

In the case before this Court, the Defendants exceeded this standard of reckless or callous disregard of Plaintiffs' rights and further clearly deliberately and intentionally violated the federal laws. In *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), Judge Wright cited *Protectus Alpha Navigation, supra*, with approval and observed that

the purposes of punitive damages "support their availability in general maritime law and the trend is to allow such recoveries". Punitive damages have been allowed by the First Circuit where the Defendants tortiously interfered with the Plaintiffs' future employment. See *Pino v. Protection Maritime Insurance Company, Ltd., supra.* See also, "Punitive Damages in Admiralty," Waddell, *Journal of Maritime Law and Commerce,* Volume 19, No. 1, January, 1988.

Punitive Damages for Defendants' abusive treatment of their seafarers and outrageous breach of their contractual rights does not duplicate this Court's award for penalty wages. *Buckley v. Oceanic S.S. Co.*, 5 F.2d 545 (9th Cir. 1925); *Gerber v. Spencer, supra.* The imposition of the penalty wages results from Defendants' violation of the penalty wage statute and not the general maritime law of the United States. The imposition of punitive damages results from the Defendants' commission of separate maritime torts claimed as separate causes of action under the general maritime law. Plaintiffs have asserted separate causes of action in tort under the general maritime law. The compensatory and punitive damages sought under those claims are separate and apart from the statutory relief claimed under the United States Shipping Code.

As noted above, Defendants entered the phrase "Requested Repatriation Upon Filing Wage Claim to Arrest Vessel" in the Plaintiffs' seamen's books with the intended and naturally foreseeable result of blacklisting them among all manning agents in the Philippines, thereby effectively depriving them of their livelihood as seafarers. In view of the severe damage inflicted upon Plaintiffs by Defendants' deliberate and vindictive misconduct, and the predictable, chilling effect that conduct

will have on the willingness of present and future crews on Delica's Inui-managed and Western-manned vessels to seek to vindicate their rights, punitive damages are necessary both to deter future such misconduct and to reassure those seamen that their right to seek redress against their masters under American laws will be protected.[22]

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[22]The instant case is distinguishable from *Smith v. Atlas Off-Shore Boat Service, Inc., supra*, where the Fifth Circuit declined to asses punitive damages for an unlawful retaliatory discharge. Unlike here, that case involved the retaliatory discharge of a single seaman for filing a claim for personal injuries under the Jones Act, and the discharge was not accompanied by blacklisting or other vindictive attempts to affect the seaman's future employment prospects.

EXCERPTS FROM REPLY BRIEF OF APPELLANTS (BLACKLISTING)

Pages 9, line 17, through 10, line 17

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V.

THE ADDITIONAL TORTS CLAIMED BY MR. DODSON ON APPEAL ARE SUPPORTED NEITHER BY THE FINDINGS NOR THE EVIDENCE

In his Findings of Fact and Conclusions of Law Judge Tanner ruled that the plaintiffs were entitled to a tort recovery, but he did not identify the tort. Mr. Dodson argues that the evidence at trial supported a judgment for the plaintiffs for blacklisting and for fraud. Perhaps uncertain about this conclusion, he then lists ten more tort theories that he argues are established by the evidence and support the judgment. Of these, only the outrage theory was pleaded in the complaints or identified in the pretrial order.[9]

Throughout these coordinated cases Mr. Dodson has indiscriminately scattered strings of irrelevant cases and doctrines in his wake and then left opposing counsel to

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[9]The torts are the following: 1) "intimidation, coercion, and duress . . ." Dodson Br. p. 65; 2) "intentional . . . violation of . . . civil and criminal laws of the United States and the State of Washington . . ." p. 65; 3) "intentional infliction of emotional distress . . ." p. 65, p. 68; 4) "intentional breach of their covenant and duty of good faith . . ." p. 65; 5) "breach of their special relationship and fiduciary relationship with Plaintiffs." p. 65; 6) "retaliatory action against employees . . ." p. 65; 7) "wrongful interference with . . . future employment as seamen . . ." p. 66; 8) "outrage" p. 69; 9) "wrongful termination of employment in violation of public policy" p. 70; and 10) "constructive fraud" p. 70.

follow after and clean up the resulting mess. Defendants decline to do so here. It would be possible to review the necessary elements of all of the new torts he invokes and show why each is inapplicable, but it is not a practical use of the space allowed or the Court's time. In summary, these torts can be sorted into three groups: one based on enlisting the seamen in the ITF program, the second on terminating the seamen's employment, and the third on the entries in the Seamen's Books.

As to the first group, no matter what torts Mr. Dodson claims occurred, the knowing, willing participation of the seamen precludes a tort. As to the second group, it was the seamen, not the defendants, who ended the employment relationship. Finally, whatever torts Mr. Dodson thinks the notations constitute, the statements in the books are truthful and privileged and also cannot be considered tortious for other doctrinal reasons discussed in defendants' opening brief at pp. 71-72. Plaintiffs' briefs do not even respond to the argument that the notations are privileged.

II.

EXCERPTS RE *BACK WAGES* FROM PARTIES' BRIEFING ON APPEAL IN THE NINTH CIRCUIT

[Editor's note: Typographical errors, especially the numerous ones in Petitioner's Briefing below, have not been corrected.]

EXCERPTS FROM BRIEF OF APPELLANTS (BACK WAGES)

Pages 12, line 21, through 14, line 24; pages 53, line 15, through 58, line 10; Addendum No. 3, pages 1-8

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P. Defendants Pay the Back Wages Demanded by the Thirteen Individual Plaintiffs

Plaintiffs' first complaint sought back wages as of January 24, 1990, for the eleven plaintiffs in amounts totaling $203,735.74, but the total in the complaint was $231,198.58 because of an error in addition, DN 1, ¶9, pp. 4-5. Nevertheless, on February 8, 1990, defendants tendered $231,198.58 to the plaintiffs. Hrg. Tr. (2/8/90) 26, 32:6-8, 35:12-14, 18:20-24, 19:1-5, *See Id.* 15 ("We have paid your honor, it's like a gun to somebody's head."). Mr. Dodson rejected the tender that day, because he had filed or was about to file the first amended complaint adding two individual and six AMOSUP Plaintiffs, and increasing the claims. *Id.* 26-27, 31-33. Mr. Dodson stated, "We have to respectfully decline a partial tender." *Id.* 27:17.

The first amended complaint claimed back wages due as of February 7, 1990, of $429,580.20. ER 320, DN 16, p. 4, ¶9; Tr. Ex. 23. Of this amount, between $265,000 and $270,000 was the total, as of February 7, of the back wages claimed for the thirteen individuals. ER 320, *Id.*, Ex. A. This was not broken out from the damages claimed for the entire crew.[27] *Id.*

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[27] Although Silverio and Cabibihan had not yet been added to the action in the first amended complaint, Exhibit A contains [footnote continued]

The second amended complaint, which was filed as part of a motion for leave to amend on February 13, 1990, and added the last two AMOSUP Plaintiffs (Silverio and Cabibihan), continued to demand $429,580.20 as the back wages due on February 7, 1990. DN 29, 56, p. 5, ¶9, Ex. A. The amounts claimed for the thirteen individual plaintiffs also remained the same. *Id.*, Ex. A. See footnote 69 *infra* for the detail of all wage claims in the complaints.

On February 13, 1990, the filing date of the motion to file a second amended complaint, defendants tendered $267,585.65 to plaintiffs on their counsel's representation that these were the back wages due the thirteen individual plaintiffs. ER 842-843, Addendum No. 2, p. 2-3;[28] DN 195, FF 20, p. lines 17-18 only.[29] Plaintiffs accepted this tender. DN 195, pp. 7:4, 17:11-12.

On May 8, 1990, in Baton Rouge, Louisiana, Mr. Dodson's damages expert G. Randolph Rice testified in his deposition that the $267,585.65 paid by defendants was $15,610 more than was actually due. Tr. Ex. 28, Rice 4, 5, Ex. 3 (introduced as Tr. Ex. 6A at trial). Mr. Dodson, on the record, confirmed this ("In other words, we were overpaid slightly . . ."). *Id.* 5:25, 6:1-4, Ex. 3.

At trial, the individual plaintiffs made no claim for earned back wages. DN 176/177, PTO pp. 9-13. Dr. Rice testified again that they had been overpaid, Tr.

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damage claims for them as well as for the other six AMOSUP Plaintiffs.

[28] See Part III, Argument, *infra*, for the reasons requiring Mr. Stacey's cited Declaration.

[29] Defendants accept only the lines specifically cited in Finding of Fact 20. Most of the remainder of that Finding is clear error and contrary even to plaintiffs' evidence, as will be discussed.

92-93, Tr. Ex. 6A, basing his calculation on Mr. Dodson's data. Tr. 93-94. At one point, defendants' counsel reminded the court that the individual plaintiffs' claimed wages had been paid, AMOSUP's counsel said that the AMOSUP Plaintiffs had not been fully paid and Mr. Dodson said nothing. Tr. 262-265. Mr. Dodson closed for all plaintiffs, claiming "penal wages for all twenty-one of the plaintiffs," but back wages only for "the AMOSUP eight, because they have never been paid their back wages under the shipping articles." Tr. 374.[30]

Judge Tanner orally found for plaintiffs and directed them to prepare Findings of Fact and Conclusions of Law. Tr. 373. On June 27, 1990, thirty-five days after trial, plaintiffs filed Proposed Findings of Fact and Conclusions of Law. DN 188. These included a proposed finding that the individual plaintiffs were still due earned back wages of $7,206.02. *Id.* at p. 14-15:26, fn. 24; ER 831-832. This amount allegedly represented wages covering January 24, 1990, to February 8, 1990, which allegedly were not included in the $267,585.60 paid plaintiffs. *Id.* The alleged shortfall, plaintiffs contended, meant that statutory penalties had continued to accrue after February, 1990.

At a July 13, 1990, hearing on the Findings and Conclusions, Mr. Dodson again stated that back wages were still due the thirteen individual plaintiffs. Hrg. Tr. (7/13/90) 16-18. Defendants' counsel objected, reminding the court that Dr. Rice had testified that plaintiffs had been overpaid $15,610 as of February 16, 1990. *Id.* at 22-23. Judge Tanner then responded that all back

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[30]The AMOSUP Plaintiffs had been paid the difference between AMOSUP and POEA wages. Tr. 356, 374:18-20, Tr. Ex. 41, p. 14.

wages had not been paid because the "$267,585 did not include penalty wages." *Id.* at 23:13-25. He subsequently found in his Findings and Conclusions that:

> 20. On February 13, 1990, the total sum of $267,585.65 was tendered by defendants to the original thirteen plaintiffs for wages claimed through January 24, 1990, but the tender did not include penalty wages. The amount tendered did not include $15,019.20 in wages earned by the seamen between January 24th and February 8th, the date of final discharge which amount was claimed in plaintiffs' amended complaints for back wages. . . . Defendants have failed to show sufficient cause for withholding payment of penalty wages once back due wages were paid in February of 1990.

DN 195.[31]

* * * *

2. The Amount Tendered Was In Fact An Overpayment

Since Dr. Rice's testimony that the $267,585 was an overpayment was the only evidence at trial on the subject – and it was plaintiffs' evidence – Judge Tanner's Finding No. 20 that it did not include wages earned between January 24, 1990, and February 8, 1990, was clearly erroneous. The claim after trial that there had been a mathematical mistake was not evidence and was too late, because made after the record closed.

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[31] Although Judge Tanner found that $15,019.20 in back wages was still due the thirteen individual plaintiffs, later in the Findings he awarded $23,696.09. DN 195, FF 33, pp. 9-10. This discrepancy between the back wages found due the thirteen plaintiffs in Finding No. 20 and the back wages in Finding No. 33 was first discovered in preparing this brief. The back wages for each of the thirteen individual plaintiffs were not totaled in the Findings.

In addition, Mr. Dodson's new arithmetic was wrong.[58] Even accepting the figures on which he based his new calculations, the $267,585 exceeded the back wages due through February 8, 1990.

After the trial, Mr. Dodson filed Proposed Findings of Fact and Conclusions of Law on June 27, 1990, and Amended Proposed Findings of Fact and Conclusions of Law with a motion to amend his original proposed findings on July 12, 1990. ER 831-832, 834-835, DN 188, pp. 14-15, DN 190, pp. 14-15 In paragraph 24 of his first set of Proposed Findings, Mr. Dodson claims for the first time that the $267,585.65 is less than the full wages claimed, supporting this with a chart in footnote 24. With the exception of the figures under the heading "Monthly Wages" under the shipping articles and "Wages Paid", the figures in the chart appear incorrect.[59] But it is the "Monthly Wages" column on which the Court should focus. Defendants accept these figures with an insignificant caveat.[60]

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[58]The correct calculations, giving plaintiffs the benefit of every reasonable assumption, and the proper method of determining wages under the ITF model agreement which Judge Tanner held to be applicable, are set forth in Addendum No. 3 and show that the amount actually due on plaintiffs' theory was less than the amount paid. These calculations are the only ones supported by the evidence in this case and thus Judge Tanner's contrary conclusion is clearly erroneous.

[59]Defendants do not know if the figures under the heading "Payments Made After Arrest" are correct, because these represent Mr. Dodson's allocation of portions of the $267,585 to his clients. Defendants paid him a lump sum. He apparently paid some seamen more and some less than what they were entitled to, if ITF wages were due. *See* Tr. Ex. 6A.

[60]They are identical to defendants' corresponding figures in Addendum No. 3, except they omit the fact that Alvarado for

[footnote continued]

These figures purportedly represent the amount each seaman was entitled to each month. If the figures are accepted, multiplied by the number of months worked and then reduced by the amount the seaman was actually paid each month, the calculation yields total back wages due. The formula would be "Back Wages Due" (BW) equals "Monthly ITF Wages" (W) times "Months Worked" (M) minus "Amount Actually Paid" (P): BW = (W x M) – P.

The number of months worked is disputed, although the record is clear. The seamen joined the vessel on March 19, 1989. Tr. Exs. 4, 8. Plaintiffs introduced no evidence to the contrary at trial. Dr. Rice, who received his information from Mr. Dodson, calculated back wages on the assumption that the seamen began work on March 19, 1989, and testified to that effect. Tr. 92-94, Tr. Ex. 6A. Judge Tanner found that the seamen joined the vessel on March 27, 1990, the date on the signature page of the shipping articles. DN 195, FF 6, Tr. Ex. 1. For purposes of argument, however, defendants accept Mr. Dodson's contention that March 9, 1989, was the commencement date for the thirteen individual plaintiffs other than Raby.[61] Defendants also accept his contention that their employment ended on February 8, 1989.[62] On this

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most of his time on the vessel would have received $3,375.60, not $4,193.20, if ITF wages applied. See discussion below. The fact is reflected in plaintiffs' chart in the "Total Due" column which has a figure for Alvarado that could not be the product of $4,-193.20 for the ten to eleven months he worked on the vessel.

[61] Mr. Dodson apparently takes the position that the seamen began work on the day they signed the POEA contracts, March 9, 1989. This is not evidence of when they actually began work, which is the only relevant date under the shipping articles he says are controlling. *See* Tr. Ex. 1, p. 1.

[62] Arguably, their employment and wages ended when plaintiffs arrested the vessel, and the statute no longer applied. *Putnam v. Lower*, 236 F.2d 561, 570 (9th Cir. 1956).

assumption, all of the seamen, other than Raby, worked on the vessel for eleven months. Raby worked on the vessel from September 2, 1989, to February 8, 1990, or five months and seven days, i.e., 5.233 months.

Alvarado's pay changed on January 6, 1990, when he was promoted to chief officer after Cabibihan left the vessel. Alvarado's monthly ITF income from January 6, 1989, to February 8, 1990, was $4,193.20, as set forth in Mr. Dodson's chart, which is also the figure calculated by Dr. Rice and presented in Trial Exhibit 6A. His earlier monthly ITF wage was $3,375.60. *See* Addendum No. 3, Tr. Exs. 1, 6 (May 7, 1990, letter from Dr. Rice to Mr. Dodson), 9, Annex 1.[63] For ease of calculation and in order to give plaintiffs every benefit of the doubt, we assume that Alvarado was promoted on January 1, 1990, and that he had a monthly wage of $3,375.60 from March 9, 1989, to January 1, 1990, or for nine months and twenty-two days (9.733 months), and a monthly wage of $4,193.20 from January 1, 1990, to February 8, 1990 (1.2667 months).

Defendants will also accept Mr. Dodson's calculation of the total amount actually paid to plaintiffs during the eleven months: $67,133.60.

The Court can now see the wages that actually would have been due the thirteen individual plaintiffs using Mr. Dodson's own figures for monthly ITF wages:

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[63]Mr. Dodson does not set forth Alvarado's earlier ITF pay, but it is clear from the articles and the annex to the ITF world-wide agreement that it was $3,375.60. Tr. Exs. 1, 9, Annex 1. This was the same pay as Torreliza and Roz received; they all were listed on the articles' sign-on sheet as having the same base pay of $1430 under the ITF scale and the calculation of additional pay under the ITF model agreement is based completely on the base pay. *Ibid.*

	Monthly Wage	x	*Months Worked*		*Total ITF Wages*
Raby	$4,193.20	x	5.2334	=	$21,944.69
Torreliza	$3,375.60	x	11	=	$37,131.60
Ajero	$3,254.40	x	11	=	$35,798.40
Banogan	$1,477.40	x	11	=	$16,251.40
Cabales	$1,970.60	x	11	=	$21,676.60
Roz	$3,375.60	x	11	=	$37,131.60
Rabie	$1,970.60	x	11	=	$21,676.60
Berido	$1,970.60	x	11	=	$21,676.60
Suarez	$1,970.60	x	11	=	$21,676.60
Marquez	$1,477.40	x	11	=	$16,251.40
Bonnit	$1,477.40	x	11	=	$16,251.40
Laxina	$1,477.40	x	11	=	$16,251.40
Alvarado (as 2d officer)	$3,375.60	x	9.7333	=	$32,855.73
(as 1st officer)	$4,193.20	x	1.2667	=	$ 5,311.53
Total ITF Wages Earned					$321,885.55

Total ITF wages earned through February 8, 1990, are thus $321,885.55. From that amount total pay actually received by the thirteen plaintiffs – $67,133.60, according to plaintiffs – is subtracted. The back wages due as of February 8 would then be $254,751.95.

$321,885.55
- 67,133.60
$254,751.95

When the $254,751.95 actually due using plaintiffs' premises is subtracted from the $267,585.65 paid by defendants, the result is an overpayment of $12,833.70.

$267,585.65
– 254,751.95
$ 12,833.70

This is not the figure yielded by Mr. Dodson's calculations because he apparently used the wrong factors and counted some wages twice. An extended proof of his errors is unnecessary because enough are obvious. Note the headings in the chart in footnote 24 of the First Proposed Findings. ER 831-832. Column 2 represents the total wages due for the time the seamen were on board as $326,906.07. See "Subtotal" on p. 15. ER 832. That should be the entire amount due, because the seamen were on board until February 8, 1990. But the next to the last column adds more wages, for the period 1/25/90 to 2/8/90, which total $15,019.20, thus double counting two weeks of the ITF wages.

The errors in Mr. Dodson's calculations are also revealed by dividing the total ITF wages (column 2) by the monthly ITF wage (column 1). This yields the number of months by which he multiplied the monthly wage.[64] That number turns out to be 11.133. In other words, Mr. Dodson's calculation assumes that the men were on board the vessel eleven months and four days. Of course, this is incorrect because March 9, 1989, to February 8, 1990, is not eleven months, four days, but only eleven months. But then he compounds the error by adding wages for two more weeks – purportedly to cover 1/24/90 - 2/8/90 – to this total, thus giving them wages for eleven months and *eighteen* days.

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[64] This calculation cannot be performed on Alvarado's figures, because they represent a hybrid of two different monthly wages.

In his Amended Proposed Findings of Fact, Mr. Dodson's chart is in footnote 25 on p. 14. ER 834-835. Here he changes the headings so that the figures in the second column under "Total Due For Time On Board" now supposedly represent only wages earned during the period ending 1/24/90. But the figures in the column remain the same, as do the figures in column one, "Monthly Wages." This means that he is still multiplying the monthly wages by 11.133, i.e., on the assumption of eleven months and four days. But the period from March 9, 1989, to January 24, 1990, is not eleven months and four days. It is ten months and sixteen days.

3. Judge Tanner's Findings Were Not Supported By Evidence, Were Internally Inconsistent, and Were Even Contradicted by Plaintiffs' Own Calculations

Finding of Fact No. 20 states:

> 20. On February 13, 1990, the total sum of $267,585.65 was tendered by defendants to the original 13 plaintiffs for wages claimed through January 24, 1990, but the tender did not include penalty wages. The amount tendered did not include $15,019.20 in wages earned by the seamen between January 24th and February 8th, the date of final discharge which amount was claimed in plaintiffs' amended complaints for back wages. Payments were made without admission of liability and with reservations of right to collect same if court found in favor of defendants. Penalty wages are included in the definition of wages. Defendants have failed to show sufficient cause for withholding payment of penalty wages once back due wages were paid in February of 1990.

The preceding section shows the clear error in Judge Tanner's Finding that the February 13, 1990, tender did not include $15,019.20 allegedly earned between January 24 and February 8. Even Mr. Dodson agreed that the Finding was wrong. He claimed $7,206.00 still owed, not $15,019.20. See footnote 24 to his Proposed Findings and footnote 25 to his Amended Proposed Findings. ER 831-832, 834-835 (see "Subtotal" under "Balance Due"). See also ER 867, Hrg. Tr. (1/28/91) 13.[65]

Judge Tanner's Finding on this issue in Finding of Fact No. 20 is contradicted later in Finding of Fact No. 33, in which he awards plaintiffs not $15,019.20 in remaining back pay, but a total of $23,696.09. Defendants are at a loss as to the derivation of this number.

Another puzzling and apparently self-contradictory aspect of the Findings is reflected in Judge Tanner's allowance to defendants of a set-off of $267,585.65 – the amount of the tender – against the total damages. DN 195, CL 9. This is far in excess of the total back wages awarded of $165,932.13. In other words, the $267,585.65 tender more than covers the back wages awarded to the plaintiffs and amounts to a ruling that they have been paid. This may or may not be what Judge Tanner intended, but whatever he intended, the Findings on back wages are not only unsupported by evidence, they are internally inconsistent – indeed, incoherent.

Perhaps nothing better illustrates this than the final sentence of Finding of Fact No. 20, which states, "Defendants have failed to show sufficient cause for withholding payment of *penalty* wages once back due

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[65]Mr. Dodson did not claim the full $15,019.20 which he claimed for the period 1/25/90 - 2/8/90, because he acknowledged that he had earlier claimed too much for seaman Alvarado. ER 832, n.24 (Alvarado entry, last column).

wages were paid in February of 1990." Here the unmistakable implication is that all back wages due were paid in February, 1990, which was probably what Judge Tanner had intended to find before he saw plaintiffs' Proposed Findings. See his remarks at trial. Tr. 261-265.[66]

* * * *

ADDENDUM NO. 3

CALCULATION OF BACK WAGES UNDER THE MODEL ITF WORLD-WIDE COLLECTIVE AGREEMENT

Introduction

Judge Tanner found that the rate stated in the signature page of the shipping articles was the rate to which the plaintiffs were entitled. He also found that the shipping articles incorporated the model ITF world-wide collective agreement, rather than the ITF collective agreement signed with JSU/AMOSUP. Tr. Exs. 9, 3. Although defendants vigorously challenge both of these findings, this Addendum assumes they are correct and attempts to provide the court with a clear description of

(a) the proper method for calculating wages under the model ITF world-wide agreement; and

(b) the actual calculation of back wages due the thirteen individual plaintiffs on the assumption that the agreement applies.

There are four calculations because the dates that the men worked are disputed by the parties. Although Mr.

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[66] Plaintiffs also assign as clear error the Finding that the amount of $15,019.20 "was claimed in plaintiffs' amended complaints for back wages." See footnote 44.

Dodson's most recent argument is that the men began work on March 9, 1989, it is unsupported by record evidence and it was not the date used by his expert, Dr. Rice. The date supported by the record and used by Dr. Rice was March 19, 1989, the date the seamen joined the vessel and the date from which their pay actually ran – a date to which no seaman ever objected before the vessel's arrest. See Tr. Ex. 8, 4 (March, 1989 wage receipts).

The date of termination of employment, however, is less clear. This appendix provides four calculations based on four different assumptions – an ending date of January 24, 1990, of January 31, 1990, of February 8, 1990 (Mr. Dodson's selection), and of February 16, 1990.

Whenever possible, necessary assumptions are made in favor of the plaintiffs.

The Elements of the Monthly Wage
Under the ITF World-Wide Agreement

The total monthly pay of a seaman under the model ITF world-wide agreement, Tr. Ex. 9, consists of four elements:

1. *Basic monthly pay* (*Id.* §4, Annex 1)

2. *Overtime* (*Id.* §6, 7(b), Annex 1)

3. *Leave pay* (*Id.* §15, Annex 1)

4. *Subsistence Allowance* (*Id.* §21, Annex 2)

1. *Basic Monthly Pay.* This is taken from the signature page of the Articles and derives from Annex 1 of the model agreement. Tr. Ex. 9, immediately following §27.

2. *Overtime.* There are two overtime rates, both of which are set forth in Annex 1. The first is for weekday overtime. The second is for overtime on Saturdays, Sundays, and Holidays ("Saturday Overtime").

Because records on the Pine Forest were not kept in accord with the model agreement, overtime for each seaman is conclusively presumed to be 40 hours of weekday overtime and 64 hours of Saturday Overtime each month. *Id.* §7(b).

3. *Leave Pay.* The model agreement provides that each seaman receives four days of leave pay per month. *Id.* §15. The daily pay for each position is set forth in Annex 1. Monthly leave pay is thus four (4) multiplied by the daily rate in Annex 1.

4. *Subsistence Allowance.* Each seaman receives the same subsistence allowance of $17.60 per day under the model agreement. *Id.*, Annex 2. Since this is an allowance for subsistence during paid leave, *Id.* §2, to determine *monthly* subsistence due, the daily allowance is multiplied by four (4) – the number of days of paid leave provided. See generally Tr. Ex. 6. In this case, each seaman receives $70.40 per month.

Illustrations of Calculation

Two illustrations are provided: the first for seaman Roz who worked at the same rank from the day he joined the vessel to the day he left on February 8, 1990; the second for seaman Alvarado who worked as second officer from the day he joined the vessel until January 6, 1990 and then served as chief officer at higher pay until February 8, 1990.

Illustration 1. Teofanis F. Roz – Second Assistant Engineer

The Articles specify Mr. Roz's wage as $1,430. This is listed as the base pay. Because overtime hours were not recorded per the ITF agreement, Mr. Roz is paid for 40 hours of weekday overtime and 64 hours of Saturday Overtime, at $10.60 per hour of weekday overtime and $19.10 per hour of Saturday Overtime. This is $424 for weekday and $1,222.40 for Saturday Overtime.

He is also paid for four days of vacation per month. Under the ITF Agreement, Annex 1, Mr. Roz's daily leave pay is $57.20. This daily wage is then multiplied by four and yields $228.80, the monthly leave pay.

Finally, Mr. Roz would receive a subsistence payment of $17.60 for each day of paid leave. Four times $17.60 equals $70.40.

Adding together the base pay, weekday overtime, Saturday Overtime, paid leave, and subsistence equals the total monthly salary per the ITF agreement of $3,375.60.

Base pay	$1,430.00
Overtime (W)	424.00
Overtime (S)	1,222.40
Leave pay	228.80
Subsistence	70.40
	$3,375.60

Illustration 2. Camilo A. Alvarado

A. Monthly Model ITF Wage as Second Officer

Second officer's base pay is the same as second assistant engineer. Tr. Ex. 9, Annex 1; Tr. Ex. 1. Accordingly, Mr. Alvarado had the same overtime, paid leave and subsistence allowance as Mr. Roz (Annex 1). In other words,

he had the same monthly wage under the model agreement: $3,375.60.

B. Monthly Model ITF Wage as Chief Officer

The base pay of the chief officer is $1,786.

Overtime rate is

$13.20/hr (weekday)
$23.80/hr (Saturday, Sunday, Holiday)

Forty hours weekday overtime is

$13.20 x 40 = $528.00

Sixty-four hours Saturday Overtime is

$23.80 x 64 = $1,523.20

Total monthly overtime is

$528.00 + $1,523.20 = $2,051.20

Leave pay for chief officer

Daily rate:	$ 71.40
times four days	x 4
	$285.60

Subsistence = $70.40/month.

Alvarado's monthly pay as chief officer is thus

Base pay	$1,786.00
Overtime	2,051.20
Leave pay	285.60
Subsistence	70.40
	$4,193.20

The monthly wages under the ITF world-wide agreement for each of the thirteen seamen is set forth in Chart A below.

CHART A – CALCULATION OF MONTHLY WAGE UNDER MODEL ITF WORLD-WIDE AGREEMENT FOR EACH OF THE 13 INDIVIDUAL PLAINTIFFS

PLAINTIFFS	BASE PAY (1)	REGULAR OVERTIME (2)	SPECIAL OVERTIME (3)	PAID LEAVE (4)	SUBSIS-TENCE (5)	TOTAL MONTHLY
C. Alvarado*	$1,430.00	$424.00	$1,222.40	$228.80	$70.40	$3,375.60
C. Alvarado**	$1,786.00	$528.00	$1,523.20	$285.60	$70.40	$4,193.20
N. Raby	$1,786.00	$528.00	$1,523.20	$285.60	$70.40	$4,193.20
T. Roz	$1,430.00	$424.00	$1,222.40	$228.80	$70.40	$3,375.60
A. Torreliza	$1,430.00	$424.00	$1,222.40	$228.80	$70.40	$3,375.60
C. Ajero	$1,378.00	$408.00	$1,177.60	$220.40	$70.40	$3,254.40
T. Rabie	$821.00	$244.00	$704.00	$131.20	$70.40	$1,970.60
M. Berido	$821.00	$244.00	$704.00	$131.20	$70.40	$1,970.60
M. Suarez	$821.00	$244.00	$704.00	$131.20	$70.40	$1,970.60
M. Cabales	$821.00	$244.00	$704.00	$131.20	$70.40	$1,970.60
T. Marquez	$611.00	$180.00	$518.40	$97.60	$70.40	$1,477.40
L. Bonnit	$611.00	$180.00	$518.40	$97.60	$70.40	$1,477.40
H. Banogon	$611.00	$180.00	$518.40	$97.60	$70.40	$1,477.40
C. Laxina	$611.00	$180.00	$518.40	$97.60	$70.40	$1,477.40

*until January 5

**January 6 to completion of employment

1. Base pay taken from shipping articles.
2. Weekday Overtime calculated as 40 hours of overtime using ITF regular overtime rate.
3. Saturday Overtime calculated as 64 hours of overtime using ITF special overtime rate.
4. Paid leave is based on four days leave per thirty day month.
5. Subsistence Allowance is based on paid leave days at ITF rate.

The total monthly salary for each man is carried down from the chart above to the charts below. Multiplying this number by the total months worked gives the total amount each seaman would have earned under the ITF world-wide agreement. The total months worked was calculated by counting the number of months from March 19, 1989, until January 24, 1990, January 31, 1990, February 8, 1990, and February 16, 1990.

For instance, in the first chart, most men worked from March 19 until January 24. From March 19 until January 18 is ten months. January 19 until January 24 is 6 days. Six days divided by 30 days is 0.2 months. Therefore, the total months is 10.2. Mr. Alvarado worked from March 19, 1989 until January 5, 1990, which is 9.6 months, at $3,375.60 per month. He then worked from January 6 until January 24, 0.63 months, at $4,193.36 per month. Mr. Raby did not join the ship until September 2, 1989, and thus by January 24 had only worked 4.766667 months.

The correct calculations, defendants contend, are set forth in Chart II or Chart III depending how the law is interpreted; Chart II shows an overpayment of $29,425.89; Chart III an overpayment of $21,122.23.

CHART I

MODEL ITF WORLD-WIDE BACK WAGES
(3/19/89 TO 1/24/90)

PLAINTIFFS	TOTAL MONTHLY	MONTHS WORKED UNTIL 1/24	AMOUNT DUE	AMOUNT PAID	PAYMENT RECEIVED	TOTAL DUE
C. Alvarado	$3,375.60	9.6	$32,405.76	$10,974.17	$36,835.85	
C. Alvarado*	$4,193.20	0.63	$2,641.72			($12,762.54)
N. Raby**	$4,193.20	4.766667	$19,987.59	$4,529.29	$17,875.50	($2,417.20)
T. Roz	$3,375.60	10.2	$34,431.12	$8,600.16	$29,000.85	($3,169.89)
A. Torreliza	$3,375.60	10.2	$34,431.12	$6,766.61	$30,769.06	($3,104.55)
C. Ajero	$3,254.40	10.2	$33,194.88	$6,958.18	$29,030.14	($2,793.44)
T. Rabie	$1,970.60	10.2	$20,100.12	$4,073.12	$17,909.93	($1,882.93)
M. Berido	$1,970.60	10.2	$20,100.12	$4,073.12	$17,909.93	($1,882.93)
M. Suarez	$1,970.60	10.2	$20,100.12	$4,073.12	$17,909.93	($1,882.93)
M. Cabales	$1,970.60	10.2	$20,100.12	$3,708.42	$17,909.93	($1,518.23)
T. Marquez	$1,477.40	10.2	$15,069.48	$3,188.05	$13,401.53	($1,520.10)
L. Bonnit	$1,477.40	10.2	$15,069.48	$3,500.65	$13,011.00	($1,442.17)
H. Banogon	$1,477.40	10.2	$15,069.48	$3,188.05	$13,011.00	($1,129.57)
C. Laxina	$1,477.40	10.2	$15,069.48	$3,500.65	$13,011.00	($1,422.17)
			$297,770.58	$67,133.59	$267,585.65	($36,948.66)

*PROMOTED JANUARY 6, 1990
**JOINED VESSEL SEPTEMBER 2, 1989

CHART II

MODEL ITF WORLD-WIDE BACK WAGES
(3/19/89 to 1/31/90)

PLAINTIFFS	TOTAL MONTHLY	MONTHS WORKED UNTIL 1/31	AMOUNT DUE	AMOUNT PAID	PAYMENT RECEIVED	TOTAL DUE
C. Alvarado	$3,375.60	9.6	$32,405.76	$10,974.17	$36,835.85	
C. Alvarado*	$4,193.20	0.866667	$3,634.11			($11,770.15)
N. Raby**	$4,193.20	5	$20,966.00	$4,529.29	$17,875.50	($1,438.79)
T. Roz	$3,375.60	10.433333	$35,218.76	$8,600.16	$29,000.85	($2,382.25)
A. Torreliza	$3,375.60	10.433333	$35,218.76	$6,766.61	$30,769.06	($2,316.91)
C. Ajero	$3,254.40	10.433333	$33,954.24	$6,958.18	$29,030.14	($2,034.08)
T. Rabie	$1,970.60	10.433333	$20,559.93	$4,073.12	$17,909.93	($1,423.12)
M. Berido	$1,970.60	10.433333	$20,559.93	$4,073.12	$17,909.93	($1,423.12)
M. Suarez	$1,970.60	10.433333	$20,559.93	$4,073.12	$17,909.93	($1,423.12)
M. Cabales	$1,970.60	10.433333	$20,559.93	$3,708.42	$17,909.93	($1,058.42)
T. Marquez	$1,477.40	10.433333	$15,414.21	$3,188.05	$13,401.53	($1,175.37)
L. Bonnit	$1,477.40	10.433333	$15,414.21	$3,500.65	$13,011.00	($1,097.44)
H. Banogon	$1,477.40	10.433333	$15,414.21	$3,188.05	$13,011.00	($784.84)
C. Laxina	$1,477.40	10.433333	$15,414.21	$$3,500.65	$13,011.00	($1,097.44)
			$305,294.15	$67,133.59	$267,585.65	($29,425.09)

*PROMOTED JANUARY 6, 1990
**JOINED VESSEL SEPTEMBER 2, 1989

**JOINED VESSEL SEPTEMBER 2, 1989

CHART III

MODEL ITF WORLD-WIDE BACK WAGES
(3/19/89 to 2/8/90)

PLAINTIFFS	TOTAL MONTHLY	MONTHS WORKED UNTIL 2/8	AMOUNT DUE	AMOUNT PAID	PAYMENT RECEIVED	TOTAL DUE
C. Alvarado	$3,375.60	9.6	$32,405.76	$10,974.17	$36,835.85	
C. Alvarado*	$4,193.20	1.1	$4,612.52			($10,791.74)
N. Raby**	$4,193.20	5.233333	$21,944.41	$4,529.29	$17,875.50	($460.38)
T. Roz	$3,375.60	10.7	$36,118.92	$8,600.16	$29,000.85	($1,482.09)
A. Torreliza	$3,375.60	10.7	$36,118.92	$6,766.61	$30,769.06	($1,416.75)
C. Ajero	$3,254.40	10.7	$34,822.08	$6,958.18	$29,030.14	($1,166.24)
T. Rabic	$1,970.60	10.7	$21,085.42	$4,073.12	$17,909.93	($897.63)
M. Berido	$1,970.60	10.7	$21,085.42	$4,073.12	$17,909.93	($897.63)
M. Suarez	$1,970.60	10.7	$21,085.42	$4,073.12	$17,909.93	($897.63)
M. Cabales	$1,970.60	10.7	$21,085.42	$3,708.42	$17,909.93	($532.93)
T. Marquez	$1,477.40	10.7	$15,808.18	$3,188.05	$13,401.53	($781.40)
L. Bonnit	$1,477.40	10.7	$15,808.18	$3,500.65	$13,011.00	($703.47)
H. Banogon	$1,477.40	10.7	$15,808.18	$3,188.05	$13,011.00	($390.87)
C. Laxina	$1,477.40	10.7	$15,808.18	$3,500.65	$13,011.00	($703.47)
			$313,597.01	$67,133.59	$267,585.65	($21,122.23)

*PROMOTED JANUARY 6, 1990
**JOINED VESSEL SEPTEMBER 2, 1989

CHART IV

MODEL ITF WORLD-WIDE BACK WAGES
(3/19/89 to 2/16/90)

PLAINTIFFS	TOTAL MONTHLY	MONTHS WORKED UNTIL 2/16	AMOUNT DUE	AMOUNT PAID	PAYMENT RECEIVED	TOTAL DUE
C. Alvarado	$3,375.60	9.6	$32,405.76	$10,974.17	$36,835.85	
C. Alvarado*	$4,193.20	1.366667	$5,730.71			($9,673.55)
N. Raby**	$4,193.20	5.5	$23,062.60	$4,529.29	$17,875.50	$657.81
T. Roz	$3,375.60	10.966667	$37,019.08	$8,600.16	$29,000.85	($581.93)
A. Torreliza	$3,375.60	10.966667	$37,019.08	$6,766.61	$30,769.06	($516.59)
C. Ajero	$3,254.40	10.966667	$35,689.92	$6,958.18	$29,030.14	($298.40)
T. Rabie	$1,970.60	10.966667	$21,610.91	$4,073.12	$17,909.93	($372.14)
M. Berido	$1,970.60	10.966667	$21,610.91	$4,073.12	$17,909.93	($372.14)
M. Suarez	$1,970.60	10.966667	$21,610.91	$4,073.12	$17,909.93	($372.14)
M. Cabales	$1,970.60	10.966667	$21,610.91	$3,708.42	$17,909.93	($7.44)
M. Marquez	$1,477.40	10.966667	$16,202.15	$3,188.05	$13,401.53	($387.43)
L. Bonnit	$1,477.40	10.966667	$16,202.15	$3,500.65	$13,011.00	($309.50)
H. Banogon	$1,477.40	10.966667	$16,202.15	$3,188.05	$13,011.00	$3.10
C. Laxina	$1,477.40	10.966667	$16,202.15	$3,500.65	$13,011.00	($309.50)
			$322,179.42	$67,133.59	$267,585.65	($12,539.82)

*PROMOTED JANUARY 6, 1990
**JOINED VESSEL SEPTEMBER 2, 1989

EXCERPTS FROM PLAINTIFFS/APPELLEES' ORIGINAL BRIEF ON MERITS (BACK WAGES)

Pages 54, line 8, through 57, line 3

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The documentary evidence clearly establishes that the Plaintiffs worked from March 19, 1989 to their date of discharge by operation of law, January 30, 1990. The Plaintiffs continued to work on the vessel until they were signed off on February 8, 1990. The Plaintiffs remained in Oregon until their repatriation on February 14, 1990, and arrived back in Manila on February 16, 1990. The Defendants contended at the trial that the applicable contract of employment was either the individual employments contracts signed in blank or, alternatively, the AMOSUP Collective Bargaining Agreement. Plaintiffs argued that even if AMOSUP Collective Agreement was in any way relevant, it contained a "savings clause" entitling the Plaintiffs to any "terms and conditions" which are, taken as a whole, recognized by the ITF as more favorable to the seafarer, to enjoy such terms and conditions (Tr. Ex. 3, Special Agreement, Art. 1(b) and Tr. Ex. 32B). That same agreement, the AMOSUP Collective Bargaining Agreement that the Defendants attempted to urge upon the court at the trial provides that wages shall commence on "departure from Manila" and continue to the date of arrival back in Manila. Each of the 13 Plaintiffs arrived back in Manila on February 16, 1990. As such, all that is needed is a mathematical calculation to determine the amount of wages that were due each Plaintiff, and subtract therefrom the partial

wages that were paid each month and the wages that were paid on February 8, 1991. The parties have repeatedly stipulated that the calculation of the wages due to Plaintiffs is simply a matter of math and the court could make those calculations itself (Tr. 56; 15-24, 66: 2-11). The math utilized by the Defendants is correct if one were to ignore the express language of the collective bargaining agreement that requires that wages be computed on a 30 day month, and not the actual number of days in the month (Tr. Ex. 9; ER 210).[17] As such, the Defendants' figures are in error by utilizing the actual days per month instead of the 30 day month stipulated in the collective bargaining agreement, and further in not computing the wages for the entire 335 day period of time from the seamen's employment from March 19, 1989 to their arrival back in Manila on February 16, 1990. The court made a factual finding as to the amount of each Plaintiff's past due wages, and accepted Dr. Rice's method of calculation that all parties agreed was simply a matter of math. The court made its own findings as to the number of days worked, which was 334 days which equals 11.1333 months of employment times 30 days per month per the collective bargaining agreement, and not the 10.9907 months of employment utilized in Dr. Rice's initial calculations and trial testimony. As such, the court made a finding that the Plaintiffs were employed and entitled to wages for 11.1333 months in determining the amount of wages earned. Once the amount of monthly partial pay is subtracted, along with the amount

[17] The Defendants' calculations contained in the addendum section of their brief were not introduced into evidence or contained in the record of this proceeding and should be stricken. However, because the Defendants used the wrong days per month and the incorrect days of employment, they reached the wrong result even if considered by the court.

of pay to each seaman on February 12, 1991, the following balances are due to the 13 individual Plaintiffs:

Camilo Alvarado	$(7,235.88)
Nelson Raby	$2,894.19
Teofanis Roz	$1,555.95
Apolonio Torreliza	$1,621.29
Leo Ajero	$1,762.72
Teodoro Rabie	$2,894.19
Modesto Berido	$875.91
Marcelo Suarez	$875.91
Miguelto Cabales	$1,240.61
Teodoro Marquez	$548.26
Leonardo Bonnit	$626.19
Hermenigildo Banogon	$938.79
Cervasito P. Laxina	$626.19

The trial court erroneously added the overpayment to Mr. Alvarado instead of subtracting it which resulted in the collective award of $15,000. This was solely a mathematical error. Twelve of the thirteen Plaintiffs were collectively owed the sum of $9,224.32 and Mr. Alvarado was overpaid $7,235.88.

The evidence before the trial court consisted of the undisputed pay records, the collective bargaining agreements, the period of time of each Plaintiffs' employment, and Dr. Rice's methodology of calculation which was only a matter of math. The court made its own calculations that are clearly supported by the evidence that the Plaintiffs are collectively owed past due wages of $9,224.32. Under the ruling of this Court of October 30, 1990, 918 F.2d 80, penalty wages were to accrue until all wages were paid into the registry of the court. Defendants have only themselves to blame for not having made the correct payment to the Plaintiffs. If the Defendants

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No. 92-1316

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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Petitioners,

v.

M/V PINE FOREST, *et al.*,

Respondents.

RESPONDENTS' OBJECTION TO MOTION OF PORT MINISTRIES AND THE INTERNATIONAL TRANSPORT WORKERS' FEDERATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT I. SANDERS
WOOD TATUM WONACOTT
& LANDIS
1001 S.W. Fifth Avenue
Suite 1300
Portland, Oregon 97204
(503) 224-5430
Counsel of Record.

WILLIAM R. BISHIN
1111 Third Avenue
Suite 1865
Seattle, Washington 98101
(206) 682-1584
Attorneys for Respondents.

March 18, 1993

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Respondents object to the filing of an amicus brief by the International Transport Workers' Federation ("ITF") and various port ministries in support of plaintiffs' petition for certiorari for the following reasons.

1. The putative *amici curiae* have the same interest as, and are already represented *de facto* by, the plaintiffs in this action.

2. The motion recites no matter – factual or legal – that has not already been brought to the attention of the Court by the petitioners.

3. The tactical, manipulative and deceptive nature of movants' papers disqualify them to act as friends of the Court.

I.
AMICI'S INTERESTS ARE ALREADY REPRESENTED

Neither *amici* nor their counsel requested respondents' consent to the filing of a brief supporting the petition for certiorari. The only request came from Richard J. Dodson, counsel of record for petitioners, who contacted Robert I. Sanders, lead counsel for respondents. Mr. Dodson was thus acting in a representative capacity for these *amici.*

Mr. Dodson has asserted in briefing that he secures most of the cases he prosecutes for seamen from some or all of the ministries listed as *amici* in this case. Plaintiffs/Appellees' Original Brief on the Merits, p. 25, n.8, *Raby v. M/V Pine Forest,* No. 90-35618 (9th Cir.). Deposition testimony in this case shows that his engagement in this very case was obtained through the assistance of *amicus* Tacoma Seamen's Center. Trial Exhibit 38, Deposition of Nelson R. Raby, February 12, 1990. Mr. Dodson has also described himself as an attorney for the ITF. Transcript of Hearing pp. 19-20, February 8, 1990, *Raby v. M/V Pine Forest,* No. CV-90-5038-JET (W.D. Wash.). He has at times represented the Philippine union AMOSUP and the Korean union FKSU, both affiliates of the ITF, in this case and in the related case of *Su v. M/V Southern Aster,* for which certiorari has also been sought from this Court. AMOSUP was a prevailing plaintiff in the trial court in this action, but when its entire judgment was reversed on appeal elected not to pursue review in this Court.

The close, interlocking relationship between Mr. Dodson, the petitioners and *amici* insures that the interests and arguments of all of them have been fully represented in his briefing for the petitioners. In addition, the interests identified by the ministries and the ITF as their interests are essentially the interests of the petitioners themselves. The ministries assert no interest of their own or of any parties or groups other than foreign seamen. Their only interest is as advisers to seamen – people who help them in a foreign port and advise them as to their legal rights. Needless to say, the ITF's role as a union is also representative of seamen. As the Court will see, and as the Ninth Circuit implicitly recognized, it is the ITF that has always been the true party in interest in this case with the Filipino seamen plaintiffs serving as richly rewarded surrogates. *Su v. M/V Southern Aster*, 978 F.2d 462, 465 (9th Cir. 1992).

II.
AMICI PRESENT NO NEW MATTER

The motion describes no new facts – adjudicative or legislative – that *amici* wish to bring to the attention of the Court. Nor does it identify any new legal argument or policy consideration. Rather, its argument merely tracks part of the petition for certiorari.

III.
AMICI SEEK NOT TO ASSIST, BUT TO MANIPULATE THE COURT

Since *amici* have no interests other than interests already represented in the petition and add no new matter to that document, the purpose of their papers can only be tactical and rhetorical – to repeat the arguments already made and create the impression that this is a case

of great importance and that many parties other than the plaintiffs disapprove of the Ninth Circuit's decision. This tactical use of the *amicus* privilege conflicts with its purpose and the role of an *amicus* as a "friend" of the Court.

In addition, the failures of candor reflected in *amici*'s papers disqualifies them as friends of this Court. The allegation that defendants told plaintiffs or any other seamen that they would be blacklisted and never work again if they demanded their lawful wages is false and was supported by no testimony – even of the plaintiffs – or any other evidence. The allegation that the seamen were "cheated" is another misrepresentation repeated frequently by petitioners' briefing in this action, but contradicted by their own testimony and clearly false, as the Ninth Circuit recognizes. *Id.* at 472-73.

CONCLUSION

The motion for leave to file an amicus brief in support of the petition for certiorari should be denied.

Respectfully submitted,

ROBERT I. SANDERS
WOOD TATUM WONACOTT
& LANDIS
1001 S.W. Fifth Avenue
Suite 1300
Portland, Oregon 97204
(503) 224-5430
Counsel of Record

WILLIAM R. BISHIN
1111 Third Avenue
Suite 1865
Seattle, Washington 98101
(206) 682-1584
Attorneys for Respondents.

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